83-96

Case No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

JOANNE LIMBACH,
TAX COMMISSIONER OF OHIO,
Petitioner,

v.

THE HOOVEN & ALLISON COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF OHIO

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE STATE OF OHIO CAN IMPOSE ITS NONDISCRIMINATORY AD VALOREM PROPERTY TAX ON IMPORTED RAW MATERIALS NO LONGER IN TRANSIT WHICH ARE RETAINED IN THEIR ORIGINAL PACKAGES AND HELD FOR USE IN MANUFACTURE IN OHIO WITHIN THE STRICTURES OF THE IMPORT-EXPORT CLAUSE OF THE UNITED STATES CONSTITUTION, ART. I, § 10, cl. 2.

II. WHETHER THE DECISION OF THIS COURT IN *MICHELIN TIRE CORP. v. WAGES*, 423 U.S. 276 (1976), EFFECTED A CHANGE IN THE CONTROLLING LEGAL PRINCIPLES APPLICABLE TO A DETERMINATION OF WHETHER OHIO'S ASSESSMENT OF ITS AD VALOREM PROPERTY TAX AGAINST IMPORTED RAW MATERIALS VIOLATES THE IMPORT-EXPORT CLAUSE.

III. WHETHER SUBSEQUENT TO *MICHELIN* THE DECISION OF THIS COURT IN *HOOVEN & ALLISON CO. v. EVATT*, 324 U.S. 652 (1945), RETAINS ANY VITALITY REGARDING THE ABILITY OF THE STATES TO TAX IMPORTED RAW MATERIALS.

IV. WHETHER COLLATERAL ESTOPPEL MAY BE APPLIED WHEN IT WOULD RESULT IN ONE MANUFACTURER BEING PERPETUALLY IMMUNE FROM OHIO'S AD VALOREM PROPERTY TAX ON ITS IMPORTED RAW MATERIALS WHILE ALL OTHER BUSINESSES' IMPORTED GOODS, INCLUDING RAW MATERIALS, WOULD BE SUBJECT TO THAT TAX BECAUSE OF A SUBSEQUENT CHANGE IN THE CONTROLLING LEGAL PRINCIPLES APPLICABLE TO

IMPORT-EXPORT CLAUSE CASES ENUNCIATED IN AN INTERVENING DECISION OF THIS COURT.

PARTIES

The petitioner in this action is Joanne Limbach in her capacity as Tax Commissioner of Ohio. She is the successor to Edgar L. Lindley who in his capacity as Tax Commissioner of Ohio was a party to the proceedings below. The respondent is The Hooven & Allison Company.

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The Opinion of the Ohio Supreme Court is reported at *Hooven & Allison Company v. Lindley*, 4 Ohio St. 3d 169, 447 N.E. 2d 1295 (1983). (A–2). The Decision and Order of the Ohio Board of Tax Appeals is unreported. (A–10).

JURISDICTION

The Opinion of the Ohio Supreme Court was entered as its judgment on April 20, 1983 (A – 2) and this Petition for Certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Article I, § 10, cl. 2 of the United States Constitution, and Ohio Revised Code (R.C.) sections 5709.01, 5711.01 (A) and 5711.16

Article I, § 10, cl.2 of the United States Constitution:

> No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

R.C. § 5709.01:

> All real property in this state is subject to taxation, except only such as is expressly exempted therefrom. All personal property located and used in business in this state, and all domestic animals kept in this state and not used in agriculture, except unmanufactured tobacco which shall be exempt from taxation for state purposes to the extent of the value, or amounts, of any unpaid nonrecourse loan or loans thereon granted by the United States government or any agency thereof, are subject to taxation, regardless of the residence of the owners thereof. All ships, vessels, and boats, and all shares and interests therein, defined in section 5701.03 of the Revised Code as

personal property and belonging to persons residing in this state and not used in in business wholly in another state, other than aircraft licensed in accordance with sections 4561.17 to 4561.21, inclusive, are subject to taxation. All property mentioned as taxable in this section shall be entered on the general tax list and duplicate of taxable property.

R.C. § 5711.01 (A):

(A) "Taxable property" includes all the kinds of property, except real property mentioned in section 5709.01 and 5709.02 of the Revised Code, and also the amount or value as of the date of conversion of all taxable property converted into bonds or other securities not taxed on or after the first day of November in the year preceding deposits after the date of which deposits are required to be listed in such year, except in the usual course of the taxpayer's business, to the extent he may hold or control such bonds, securities, or deposits on such day, without deduction for indebtedness created in the purchase of such bonds or securities from his credits; but taxable property does not include such investments and deposits as are taxable at the source as provided in sections 5725.01 to 5725.26 of the Revised Code, nor surrender values under policies of insurance.

R.C. § 5711.16:

A person who purchases, receives, or holds personal property for purpose of adding to its value by manufacturing, refining, rectifying, or combining different materials with a view of making a gain or profit by so doing is a manufacturer. When such person is required to return a statement of the amount of his personal property used in business, he shall include the average value, estimated as provided in this section, of all articles purchased, received, or otherwise held for the purpose of being used, in whole or in part, in manufacturing, combining, rectifying, or refining, and of all articles which were at any time by him manufactured or changed in any way, either by combining, rectifying, refining or adding thereto, which he has on hand during the year ending on the day such property is listed for taxation annually, or on the part of the year during which he was engaged in business. He shall separately list finished products not kept or stored at the place of manufacture or at a warehouse in the same county.

The average value of such property shall be ascertained by taking the value of all property subject to be listed on the average basis, owned by such manufacturer on the last business day of each month the manufacturer was engaged in business during the year. The result shall be the average value to be listed. A manufacturer shall also list all engines and machinery, and tools and implements, of every kind used, or designed to be used, in refining and manufacturing, and owned or used by such manufacturer.

NO._____

IN THE
SUPREME COURT OF THE UNITED STATES

JOANNE LIMBACH,
TAX COMMISSIONER OF OHIO,
Petitioner,

v

THE HOOVEN & ALLISON COMPANY
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioner, the Tax Commissioner of Ohio, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Ohio entered in this case.

STATEMENT OF THE CASE

Petitioner, the Tax Commissioner of Ohio, assessed ad valorem personal property taxes under R.C. Chapter 5711 against certain raw materials imported by respondent, The Hooven & Allison Co., from various foreign countries and retained in their original packages by respondent in its warehouse in Ohio for their intended use by respondent in the manufacture of cordage.

In its Inter-County Corporation Returns of Taxable Property for return years 1976 and 1977, respondent had deducted imported raw materials retained in their original packages from its manufacturing inventory, giving the following explanation:

> The inventories represent fibres imported by the taxpayer from foreign countries, held in the original packages in its warehouse in Xenia prior to being used in manufacturing cordage, and when they are removed therefrom or placed in the production line in the factory, such imported fibres so used, or removed from the original package, are thereupon transferred to the Goods in Process, and are included in the taxable inventories in Xenia City.

Subsequent to the assessment, respondent filed an application for review and redetermination of the assessment, arguing that the Import-Export Clause of the United States Constitution precludes, and the decision of this Court in *Hooven & Allison Co. v. Evatt*, 324 U.S. 652 (1945) (hereinafter *Hooven I*) collaterally estops, the Tax Commissioner from levying Ohio's ad valorem personal property taxes upon the subject imported raw materials. In the

Certificate of Determination affirming the assessment, the Tax Commissioner rejected respondent's arguments on the basis of this Court's decision in *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976). The Certification of Determination is set forth in full in the Decision and Order of the Board of Tax Appeals (A – 11).

Respondent appealed to the Ohio Board of Tax Appeals from the Tax Commissioner's Certificate of Determination specifying the following errors, *inter alia*, in its notice of appeal:

> 2. The Commissioner erroneously determined that the State of Ohio was not collaterally estopped by the United States Supreme Court decision in *The Hooven & Allison Co. v. Evatt*, 324 U.S. 652 (1945) from assessing the Appellant's imported raw materials inventory retained in its original packages on tax-listing date.
>
> 3. The Commissioner erroneously determined that the levying of Ohio's personal property tax upon Appellant's imported raw materials inventory retained in its original packages on tax-listing date does not impair the federal government's regulation of foreign trade in contravention of the "Import-Export" clause, or of the Commerce clause of the United States Constitution.

The Board of Tax Appeals held that the Tax Commissioner was collaterally estopped by the decision of this Court in *Hooven I*. Although the Tax Commissioner, relying on this Court's decision in *Commissioner v. Sunnen*, 333 U.S. 591 (1948), argued before the Board of Tax Appeals that collateral estoppel was inapplicable because the legal principles upon which *Hooven I* was based had been abandoned by the decision of this Court in *Michelin Tire Corp. v. Wages, supra*, the Board's de-

cision contained no reference to that decision or its effect on the application of collateral estoppel based on *Hooven I*. The Board of Tax Appeals did not consider the constitutional issues raised by respondent, stating that it lacked jurisdiction to determine those issues. (A—10).

Respondent filed a notice of appeal from this decision to the Ohio Supreme Court to secure a determination on its constitutional claims. The Tax Commissioner filed a notice of appeal from the decision to the Ohio Supreme Court, specifying the following error:

> The Board erred in holding that the Tax Commissioner is collaterally estopped by the decision of the United States Supreme Court in *Hooven & Allison Co. v. Evatt*, 324 U.S. 652 (1945), from assessing the personal property tax for the tax years 1976 and 1977 on taxpayer's imported raw materials inventory retained in its original packages on tax listing day and, based on such holdings, deciding that the final determination of the Tax Commissioner in issue in BTA Case Nos. 79-C-637 and 79-C-638 should be reversed.

The Tax Commissioner argued before the Ohio Supreme Court that this Court's decision in *Michelin* so changed the legal principles controlling in Import-Export Clause cases as to render the doctrine of collateral estoppel inapplicable relying on this Court's decision in *Commissioner v. Sunnen*, *supra*.

The Ohio Supreme Court rejected the Tax Commissioner's argument that collateral estoppel was in inapplicable because *Michelin* had repudiated the "original package" doctrine upon which *Hooven I* was based and affirmed the decision of the Board of Tax Appeals that the Tax

Commissioner was collaterally estopped from assessing respondent's imported raw materials. Having held that the Tax Commissioner was barred by the doctrine of collateral estoppel from levying Ohio's ad valorem personal property tax on respondent's imported raw materials, the Ohio Supreme Court declined to address the constitutional issues raised by respondent in its appeal. (A –2).

This Petition has followed.

ARGUMENT IN SUPPORT OF ALLOWING WRIT OF CERTIORARI

1. The Decision of the Ohio Supreme Court Below Conflicts With This Court's Decision in *Michelin Tire Corp. v. Wages*

The decision of the Ohio Supreme Court that petitioner was collaterally estopped from assessing Ohio's ad valorem personal property tax against respondent's imported raw materials was apparently based upon its holding that the decision of this Court in *Hooven I*, in which such goods were held to be immune from that tax under the "original package" doctrine, was of continued vitality subsequent to this Court's decision in *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976). That holding is in direct conflict with the *Michelin* decision.

For over a century following this Court's decision in *Low v. Austin*, 80 U.S. (13 Wall.) 29 (1872), wherein the "original package" doctrine was spawned, the Import-Export Clause was viewed as a broad prohibition against all taxes on imports. *Washington Revenue Dept. v. Association of Washington Stevedoring Cos.*, 435 U.S. 734, 752 (1978); P. Hartman, *Federal Limitations on State and Local Taxation* § 5:2, at 192-193, § 5:4, at 199; W. Hellerstein, *State Taxation and the Supreme Court: Toward a More Unified Approach to Constitutional Adjudication?*, 75 Mich. L. Rev. 1426 (1977). The primary consideration in such cases was whether the challenged tax reached imports; the question to be decided was whether the goods had lost their status as imports. *Washington Revenue Dept. v. Association of Washington Stevedoring Cos.*, *supra.*, at 752, 760. Until *Michelin*, imported goods retained their status as imports so long as they remained in their original packages, and as imports they were considered to be im-

mune from all forms of state taxation under the Import-Export Clause.

In *Michelin*, this Court expressly overruled *Low v. Austin*, *supra*, and abandoned the century-old "original package" doctrine along with the concept that the Import-Export Clause constituted a broad prohibition against all forms of state taxation which fall upon imports. 423 U.S., at 279, 290 and 301; *Washington Revenue Dept. v. Association of Washington Stevedoring Cos.*, *supra*, at 760; P. Hartman, *supra*, § 5:4 at 198-199; W. Hellerstein, *supra*, at 14.

This abandonment constituted an historic break from the controlling legal principles upon which the determinations regarding the application of the Import-Export Clause had been based. *Michelin* adopted a fundamentally different approach to Import-Export Clause cases. Rather than looking at whether the goods had lost their status as imports, the Court focused upon the nature of the tax being challenged to ascertain whether it was an "Impost or Duty" forbidden by the Import-Export Clause. *Washington Revenue Dept. v. Association of Washington Stevedoring Cos.*, *supra*, at 752; P. Hartman, *supra*, at § 5:4, at 198-199; W. Hellerstein, *supra*, at 1429-1430.

The *Michelin* Court looked to the purposes behind the inclusion of the Import-Export Clause in the Constitution and determined that nondiscriminatory state ad valorem property taxes were not the type of exactions the Framers of the Constitution considered as creating the three main concerns or evils the clause was intended to eliminate:

> Our independent study persuades us that a nondiscriminatory ad valorem property tax is not the type of state exaction which the Framers of the Constitution or the Court in *Brown* had in mind as being an "impost" or "duty" and that

> *Low v. Austin*'s reliance upon the *Brown* dictum to reach the contrary conclusion was misplaced. 423 U.S., at 283.

Having held that the prohibition of the Import-Export Clause was only against the laying of "Imposts or Duties," and that a nondiscriminatory state ad valorem property tax was not such an exaction, the Court held that irrespective of whether the tires had lost their status as imports, Georgia's assessment of its nondiscriminatory ad valorem property tax against the imported tires was not prohibited by the Import-Export Clause.

The *Michelin* Court's overruling of *Low v. Austin*, *supra*, was based upon a cogent historical analysis of the original purpose and scope of the Import-Export Clause and a very critical analysis of the "original package" rule as formalized in *Low v. Austin*. While the *Michelin* Court expressly overruled only *Low v. Austin*, which it considered to be the leading decision applying the "original package" rule, 423 U.S., at 282, its decision implicitly overruled all of the cases decided subsequent to *Low v. Austin* which applied the rationale of that case and unquestionably changed the controlling legal principles applicable in Import-Export Clause cases. Among such cases applying the "original package" analysis of *Low v. Austin* was *Hooven I*.

In its decision below, the Ohio Supreme Court held that *Michelin* had neither implicitly overruled *Hooven I* nor altered the legal principles upon which that decision was based. The Court expressly found that *Hooven I* retained its vitality even subsequent to *Michelin* and, based on that finding, rejected petitioner's argument based on *Commissioner v. Sunnen*, *supra*, that *Michelin* eviscerated the collateral estoppel effect of *Hooven I*.

The Ohio Supreme Court's reasoning in its attempt to distinguish *Michelin* and *Hooven I* reveals the Court's basic misunderstanding of this Court's decision in *Michelin*. The Ohio Supreme Court distinguished the two cases based on the factual distinctiveness of the goods involved and their status as imports and on language regarding *Hooven I* contained in this Court's decision in *Youngstown Sheet & Tube Co. v. Bowers* and *United States Plywood Corp. v. Algoma*, 358 U.S. 534 (1959), a decision which was rendered prior to *Michelin* and which was based upon the "current operational needs" doctrine which was merely another test formalized to determine whether the goods at issue had lost their status as imports.

This attempt to distinguish the two cases ignores the fundamentally different approach to Import-Export Clause cases initiated by this Court in *Michelin*. Whether the goods had lost their status as imports was the specific inquiry abandoned by *Michelin*; the Court expressly refrained from addressing that question because the relevant inquiry was no longer the nature of the goods but the nature of the tax at issue. *Washington Revenue Dept. v. Association of Washington Stevedoring Cos.*, *supra*, at 752, 760. Under "the central holding of Michelin that the absolute ban is only of 'Imposts or Duties' and not of all taxes,"*Id.*, at 759, the relevant inquiry is whether the tax at issue constitutes a prohibited "Impost" or "Duty." If the challenged tax is determined not to be an "Impost" or "Duty," it will not offend the Import-Export Clause even if the goods have not lost their status as imports.

Therefore, *Hooven I* may properly be distinguished from *Michelin* only if the nature of the taxes at issue in the two cases differed. In *Michelin*, this Court held

that a nondiscriminatory state ad valorem property tax was not an "Impost"or "Duty" and therefore was not barred by the Import-Export Clause. 423 U.S., at 283. In *Hooven I*, the Court held that a nondiscriminatory state ad valorem property tax could not be assessed against imported goods so long as those goods retained their status as imports. It cannot be disputed that the taxes at issue in *Michelin* and *Hooven I* were of the very same type. The only relevant distinction between the two cases is the fact that *Hooven I* invoked the "original package" doctrine of *Low v. Austin* in holding that Ohio could not levy its nondiscriminatory ad valorem property tax upon imported goods until they lost their status as imports and that this Court repudiated the "original package" doctrine in *Michelin*. However, rather than supporting the Ohio Supreme Court's finding that *Hooven I* is of continued vitality, this distinction conclusively establishes that *Hooven I* retains no more validity than did the decision formalizing the "original package" doctrine, *Low v. Austin*, which was expressly overruled in *Michelin*.

Any suggestion that *Hooven I* was not based upon the same legal principles as was *Low v. Austin* is simply spurious. A review of *Low* and *Hooven I* reveals that Hooven I relied on the same language of *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827), and *The License Cases*, 46 U.S. (5 How.) 504, 575 (1847), upon which *Low* had based its "original package" doctrine. Obviously, if *Low* had misread *Brown* and *The License Cases*, as the *Michelin* Court expressly found, 423 U.S., at 282-283 and 299-301, so did *Hooven I*, and its holding based thereon is no more currently valid than the expressly overruled decision in *Low*.

The Ohio Supreme Court's holding below that petitioner was collaterally estopped by *Hooven I* from as-

sessing Ohio's nondiscriminatory ad valorem property tax against respondent's imported raw materials held for use in manufacture necessarily adopted the legal principle upon which *Hooven I* was based, the "original package" doctrine. Because the opinion below resurrects the "original package" doctrine expressly repudiated in *Michelin*, it is in direct conflict with *Michelin*. This attempt to resurrect the "original package" doctrine after its burial in *Michelin* must be rejected, just as this Court rejected such an attempt in *Washington Revenue Dept. v. Association of Washington Stevedoring Cos.*, *supra*, at 760.

There is no logical or legal justification which would support a retention of the "original package" doctrine in cases involving imported manufacturing inventory while applying the fundamentally different analysis of *Michelin* in cases involving imported goods held for resale. The reasoning underlying *Michelin's* abandonment of the "original package" doctrine is just as compelling with respect to imported manufacturing inventory as it is to imported goods held for resale. To allow manufacturers who use imported raw materials to retain their immunity under the "original package" doctrine and thus avoid contributing their share of the state's cost of providing its various services to all those within its borders would accord such manufacturers preferential treatment resulting in an unfair competitive advantage over manufacturers who use domestic raw materials. Such a result is counter to the express language in *Michelin* that the Import-Export Clause cannot be read to accord preferential treatment to imported goods. 423 U.S., at 287. Any attempt to distinguish *Michelin* because it involved imported goods held for resale is also inconsistent with the holding in *Hooven I* that whether the imported goods were held for resale or

for use in manufacturing was not relevant to a determination of their immunity from taxation under the Import-Export Clause. 324 U.S., at 667-668.

The opinion below represents the first time since this Court's decision in *Michelin* that the highest court of a state or a federal court has barred the assessment of a nondiscriminatory state ad valorem property tax against imported goods as being in violation of the Import-Export Clause. By granting this Petition, this Court can reject this potentially far-reaching opinion before it spawns voluminous litigation throughout the states on what had been considered by the states to be a settled issue after *Michelin*.

2. The Decision Below Failed to Properly Apply This Court's Decision in *Commissioner v. Sunnen*.

In its decision holding that petitioner was barred by the doctrine of collateral estoppel from assessing respondent's imported raw materials held for use in manufacture, the Ohio Supreme Court failed to properly apply this Court's decision in *Commissioner v. Sunnen*, *supra*, that collateral estoppel is "confined to situations . . . where the controlling facts and applicable legal rules remain unchanged." 333 U.S., at 599-600. The doctrine is inapplicable when an intervening decision of this Court modifies the controlling legal principles upon which the first decision was based. The reason for the limitation was the concern that such a modification could render a prior decision inconsistent with the current legal theory and that if that prior decision is perpetuated by applying collateral estoppel the taxpayer involved in that prior litigation will be treated differently from other taxpayers in the same class. *Id.*, at 599; *Montana v. United States*,

440 U.S. 147, 161 (1979); 1B *Moore's Federal Practice* § 0.422, at 3042, § 0.422 [5] , at 3451. The obvious rationale of this limitation on the applicability of collateral estoppel is equality and uniformity in the treatment of taxpayers. Although the opinion below does not clearly and definitively articulate the precise reason for not limiting the application of collateral estoppel[1], the effect of the decision is clear. It will result in "inequalities in the administration of the revenue laws, discriminatory distinctions in tax liability, and a fertile basis for litigious confusion," the avoidance of which was the fundamental reason for the limitation on the doctrine of collateral estoppel enunciated in *Sunnen*, 333 U.S. at 599.

If left standing, the Ohio Supreme Court's decision barring petitioner from assessing Ohio's nondiscriminatory ad valorem property tax against respondent's imported raw materials will result in respondent avoiding forever the tax on its imported raw materials inventory because of a prior decision, *Hooven I*, which was based on a now repudiated legal principle, the "original package" doctrine, while all other taxpayers would be subject to that tax on their imported raw materials inventory under the fundamentally different legal principles enunciated in *Michelin*.[2] Respondent alone would be perpetually im-

[1] As an example, while the Ohio Supreme Court apparently acknowledged that *Michelin* repudiated the "original package" doctrine, at n. 1 of its Opinion (A – 6), which indicates that it recognized that *Michelin* had changed the controlling legal principles in Import-Export Clause cases, its finding that *Hooven I* was of continued vitality subsequent to *Michelin* runs counter to that indication.

[2] Petitioner's argument that *Michelin* changed the controlling legal principle upon which *Hooven I* was decided, the "original package" doctrine, is fully addressed in the immediately preceding part of this Petition.

mune from such taxation, while all other taxpayers would subsidize the services and benefits provided by Ohio to this one taxpayer, a result not countenanced by the *Michelin* Court. 423 U.S. at 287, 289. Respondent would be accorded a distinct competitive advantage over other manufacturers, a result directly contrary to the admonition in *Sunnen* that collateral estoppel is not to be blindly applied where, because of an intervening change in the controlling legal principles, to do so would cause tax inequality.

Such a result would raise serious questions regarding discriminatory application of the tax laws and may well result in litigation by those manufacturers who are subject to the tax. The decision below may also result in litigation by other manufacturers who had received judicial determinations issued prior to *Michelin* declaring that their imported goods were immune from taxation under the Import-Export Clause. It must be assumed that a substantial number of such decisions were issued during the one-hundred plus years that the "original package" doctrine was considered to be controlling in Import-Export Clause cases.

The failure of the Ohio Supreme Court to properly apply this Court's decision in *Sunnen* and the importance of avoiding both the widespread tax inequality that will result from the decision below and the further litigation that is likely to occur until this matter is settled justify the granting of this Petition.

3. The Decision Below Raises an Issue Regarding the Scope of This Court's Decision in *Michelin* that Will Have Significant Consequences Not Only in Ohio, But Throughout the States, Regarding the Ability of the States To Tax Imported Goods.

While avoidance of the tax inequality that will result from the decision below would itself justify granting certiorari, the potential impact of the decision below on Ohio and other states is much more far-reaching.

The finding of the Ohio Supreme Court that *Hooven I* was of continued vitality even after *Michelin* has serious consequences not just for Ohio but for all states which impose ad valorem property taxes. The potential effect of such a decision is to open the floodgates to litigation by manufacturers which, since *Michelin*, have had Ohio's and other states' ad valorem property taxes levied against all of their manufacturing inventory, including imported raw materials retained in their original packages. Ohio and other states which impose ad valorem property taxes have considered such imported goods to be subject to these taxes since the decision of this Court in *Michelin* repudiated the "original package" doctrine and held that such taxes were not "Imposts or Duties" barred by the Import-Export Clause.[3]

For the past seven years, Ohio, and no doubt other states assessed and collected these taxes from manufacturers on their imported raw materials just as they did with respect to imported goods held for resale. Based on the opinion below, these manufacturers are likely to seek refunds of those portions of their tax payments which were based on the amount of their current operational needs and retained in their original packages and claim deductions

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[3] Less than two months after the *Michelin* decision was issued, petitioner issued Tax Commissioner's Bulletin No. 244 which set forth Ohio's understanding that all imported property no longer in transit was subject to its ad valorem property tax, whether it was held for resale or for use in manufacturing. (A – 25).

on current and future returns for the amount of such inventory.[4]

The decision of the Ohio Supreme Court erroneously limited the scope of this Court's decision in *Michelin* in its finding that *Hooven I* retained its vitality regarding imported raw materials held for use in manufacture. This finding is in direct conflict with the fundamental holding in *Michelin* that a nondiscriminatory state ad valorem property tax is not an "Impost" or "Duty" prohibited by the Import-Export Clause. 423 U.S., at 283. the decision below unsettles a fundamental question regarding the ability of the states to tax imported goods which Ohio and other states perceived as resolved by *Michelin*.

Because of the potentially crippling financial impact that the decision below may have on Ohio and other states, the voluminous litigation that it will generate, the importance of the issue of the breadth of the ability of the states to constitutionally tax imported goods and most importantly, the fact that the decision below di-

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[4] Petitioner makes the representation in her official capacity as Tax Commissioner that subsequent to the decision of the Ohio Supreme Court below numerous requests for refunds have been filed and numerous claims for deductions have been made on current returns based upon that decision and that many more such requests for refunds and claims for deductions are expected based upon statements by taxpayers and various counsel for taxpayers. Petitioner further represents that based on prior years' figures it is estimated that approximately $30 million is collected annually by Ohio alone from the assessment of Ohio's ad valorem property tax against such inventory. Nationwide the figure would be in the hundreds of millions of dollars per year.

rectly conflicts with this Court's decision in *Michelin*, it is essential that this Court grant this Petition and reaffirm the right of the states to impose a nondiscriminatory ad valorem property tax on all imported goods which have come to rest within the state.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Ohio.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Petition for Writ of Certiorari have been served on the respondent by forwarding such copies to Michael A. Nims, Kenneth E. Updegraft, Jr., and Charles H. Mollenberg, Jr., Jones, Day, Reavis & Pogue, 1700 Union Commerce Building, Cleveland, Ohio 44115, counsel for respondent, by United States mail, postpaid, this_____day of July, 1983. I further certify that all parties required to be served have been served.

_____

RICHARD C. FARRIN
Assistant Attorney General

APPENDIX

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NO. 82 - 559

THE SUPREME COURT OF OHIO

HOOVEN & ALLISON COMPANY,
APPELLANT AND CROSS-APPELLEE, *v.*

LINDLEY, TAX COMMR.,
APPELLEE AND CROSS-APPELLANT.

OPINION
Decided and Filed April 20, 1983

APPEAL and CROSS-APPEAL
from the Board of Tax Appeals

Appellant and cross-appellee, The Hooven & Allison Company ("Hooven"), is a domestic producer of cordage. In order to manufacture cordage, Hooven imports the requisite raw materials—hemp, sisal, jute and manila—from several foreign countries. Upon arriving in the United States, the materials are transported via rail to Hooven's plant in Xenia, Ohio, where they are inspected and stored in their original packages for future use in the manufacturing process.

In conformity with R.C. 5711.16, Hooven timely filed its 1976 and 1977 personal property tax returns. Relying on the United States Supreme Court's decision in *Hooven & Allison Co. v. Evatt* (1945), 324 U.S. 652 (hereinafter *Hooven I*), Hooven did not list as taxable property on its return the stored imported raw materials. In *Hooven I*, the court had determined that the state's taxation of Hooven's imported raw goods still stored in their original packages violated the Import-Export Clause of the United States Constitution.

Following an audit of Hooven's returns, appellee and cross-appellant, Tax Commissioner of Ohio ("commis-

sioner"), found the value of the imported raw material inventory to be taxable and increased Hooven's tax liability. Hooven subsequently filed an application for a review and redetermination of the commissioner's ruling, arguing that the Import-Export and Commerce Clauses of the United States Constitution preclude, and *Hooven I* collaterally estops, the commissioner from levying state *ad valorem* personal property taxes upon the subject goods. In upholding the assessment, the commissioner answered that the United States Supreme Court's decision in *Michelin Tire Corp. v. Wages* (1976), 423 U.S. 276, permits the imposition of such taxes on imported goods no longer in transit when the taxes are applied in a nondiscriminatory fashion, *i.e.*, in a manner not based on the status of the goods as imports.

Upon appeal, the Board of Tax Appeals reversed the assessment, declaring that, as *Hooven I* had not been overruled, the doctrine of collateral estoppel barred the taxation of the subject imports. The board, lacking jurisdiction, did not consider the constitutional issues which Hooven raised. Thus, on April 16, 1982, Hooven filed a notice of appeal in this court to secure a determination of its constitutional claims.

On April 19, 1982, the commissioner filed his notice of appeal, contesting the board's reversal of the personal property tax assessed against Hooven.

The cause is now before this court upon an appeal and cross-appeal as of right.

Messrs. Jones, Day, Reavis & Pogue, Mr. Michael A. Nims, Mr. Kenneth E. Updegraft, Jr., and *Mr. Charles H. Moellenberg, Jr.*, for appellant and cross-appellee.

Mr. Anthony J. Celebrezze, Jr., attorney general, and *Mr. Richard C. Farrin*, for appelle and cross-appellant.

Per Curiam. In the case at bar, this court must first decide whether the doctrine of collateral estoppel bars the commissioner from imposing an *ad valorem* property tax upon imported raw goods stored by Hooven in its warehouse.

In *Montana v. United States* (1979), 440 U.S. 147, the United States Supreme Court clearly set forth the operational features of the interrelated doctrines of *res judicata* and collateral estoppel. The court therein declared:

"* * * Under res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action. * * * Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. * * *" (Citations omitted.) *Montana v. United States, supra,* at 153. See, also, *Parklane Hosiery Co. v. Shore* (1979), 439 U.S. 322, 326, fn. 5; *State, ex rel. Westchester, v. Bacon* (1980), 61 Ohio St. 2d 42, 44 [15 O.O.3d 53].

As the instant cause does not involve returns for the same years at issue in *Hooven I,* it is arguable whether the more restrictive doctrine of *res judicata* is apposite here. The applicability of collateral estoppel to the case *sub judice,* however, is undeniable. Both parties to the prior action (the Hooven & Allison Company and the Tax Commissioner of Ohio) are parties to the present, and the ultimate issue decided in *Hooven I* is that now under consideration—whether an *ad valorem* personal property tax may constitutionally be assessed against imported raw materials stored in their original containers for future use.

The commissioner offers this court's decision in

Beatrice Foods Co. v. Lindley (1982), 70 Ohio St. 2d. 29 [24 O.O.3d 68], and *Standard Oil Co. v. Zangerle* (1943), 141 Ohio St. 505 [26 O.O. 82], as precedent for precluding the application of collateral estoppel to the instant action. Both cases, however, are readily distinguishable. In *Beatrice Foods, supra*, the taxpayer improperly essayed to invoke collateral estoppel where the subject issue had not been previously resolved in an adversary proceeding and where the principle argued for had not, through unchallenged operation over a period of time, gained acceptance as law. Similarly, our ruling in *Standard Oil, supra*, is not germane to the instant action as the applicability of *res judicata*, not collateral estoppel, was at issue there. Moreover, in *Standard Oil*, the taxpayer sought to shield property found to be tax-exempt in a prior year because of its then use from assessment in a later year when the property was employed in a different manner.

Nonetheless, despite the inappositeness of *Beatrice Foods* and *Standard Oil*, it must be acknowledged that, at least in the context of tax determinations, the applicability of collateral estoppel is not untempered. As the United States Supreme Court observed, in *Commissioner v. Sunnen* (1948), 333 U.S. 591, at 599-600:

"* * * [C]ollateral estoppel is a doctrine capable of being applied so as to avoid an undue disparity in the impact of income tax liability. A taxpayer may secure a judicial determination of a particular tax matter, a matter which may recur without substantial variation for some years thereafter. But a subsequent modification of the significant facts or a change or development in the controlling legal principles may make that determination obsolete or erroneous, at least for future purposes. * * * [A] judicial declaration intervening between * * * two

proceedings may so change the legal atmosphere as to render the rule of collateral estoppel inapplicable. * * * "

The commissioner argues that the United States Supreme Court's decision in *Michelin Tire Corp. v. Wages, supra* (423 U.S. 276), so altered the "legal atmosphere" relative to the constitutionality of personal property taxation of imports as to eviscerate Hooven's collateral estoppel claims. We strongly disagree.

Although the *Michelin* court clearly felt no compunction in explicitly overruling *Low v. Austin* (1871), 80 U.S. 29, the commissioner asks us to hold that that same court experienced a sudden diffidence and only tacitly overruled *Hooven I.* We are thus requested, in effect, to infer an implicit or "constructive" overruling. This we cannot do. Though twice citing *Hooven I* in its *Michelin* decision, the United States Supreme Court made no effort to overrule the former. See *Michelin Tire Corp. v. Wages, supra,* at 281, 301, fn. 13. The court's action—or inaction—must be accorded conclusive effect, at least in regard to its intent in reappraising its earlier ruling in *Hooven I.*

Moreover, that the *Michelin* court did not attempt to overrule *Hooven I* should be evident given the factual distinctiveness of the two cases. In *Michelin,* the court upheld the constitutionality of a state *ad valorem* property tax levied upon imported tires that had been mixed with domestically manufactured ones and stored for future sale and delivery to various franchised dealers, without regard to the tires' point of origin.[1] *Hooven I,*

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[1] In *Michelin,* the court additionally overruled *Low v. Austin, supra,* to the extent the latter interdicted the imposition of state taxes of any type upon imported goods, particularly the levying of *ad valorem* personal property taxes. *Michelin* has also been viewed as sounding

however, involved the validity of a state personal property tax assessed against, not imported finished goods ready for sale, but imported raw materials stored in their original packages for later use in the manufacturing process. Indeed, the court, in *Michelin*, specifically reserved judgment on the taxability of imported tire tubes still in their original cartons and segregated from their domestic counterparts, the issue most analogous to that presented in the herein action.[2] Thus, the commissioner's contention that the holding in *Michelin* controls the disposition of the case at bar must fail.

The United States Supreme Court's decision in *Youngstown Sheet & Tube Co. v. Bowers* and *United States Plywood Corp. v. Algoma* (1959), 358 U.S. 534, also attests to the continued vitality of *Hooven I*. In *Hooven I*, the court declined to consider whether the taxpayer's inventory of imported raw goods was so integral to its daily manufacturing process that the goods lost their status as imports and, thus, became susceptible to state property taxation. In *Youngstown Sheet & Tube*, *supra*, wherein guidelines for making such a calculation are

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[1] continued

the death knell for the "original package" theory, *i.e.*, that imports still in their original containers are immune from all forms of state taxation. *Michelin Tire Corp. v. Wages*, *supra*, at 297.

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[2] As the court stated, in *Michelin Tire Corp. v. Wages*, *supra*, at 279, fn. 2: "The respondents [Gwinnett County, Georgia, Tax Commissioner and Assessors] did not cross-petition from the affirmance of the holding of the Superior Court that the tubes in the corrugated shipping cartons were immune from the tax, and that holding is therefore not before us for review."

established, *Hooven I* was explicitly distinguished. The court stated: "Unlike *Hooven*, these are not cases of the mere storage in a warehouse of imported materials intended for eventual use in manufacturing but not found to have been essential to current operational needs." *Youngstown Sheet & Tube Co. v. Bowers, supra,* at 544. Clearly, the United States Supreme Court has issued no decree that invalidates its decision in *Hooven I.*

The commissioner's attempt to distill from *Michelin* a rigid and unassailable principle which would permit the taxation of imported raw materials, like those represented in the case at bar, is inappropriate, In *Brown v. Maryland* (1827), 25 U.S. (12 Wheat.) 419, which still contains the preeminent judicial analysis of the Import-Export Clause of the federal Constitution, Chief Justice Marshall disdained the adoption of an inflexible rule for determining which forms of state taxation of imported goods the clause proscribes. In discussing the prerogative of the state to levy such taxes under the clause, he stated:

"* * * The power, and the restriction on it, though quite distinguishable when they do not approach each other, may yet, like the intervening colours between white and black, approach so nearly as to perplex the understanding, as colours perplex the vision in making the distinction between them. Yet the distinction exists, and must be marked as the cases arise. Till they do arise, it might be premature to state any rule as being universal in its application.* * *" *Brown v. Maryland, supra,* at 441. The United States Supreme Court has, in short, decreed that no single prescription can adequately treat the constitutional issues raised by state taxation of various imported goods. Thus, the commissioner's attempts, through a misplaced reliance on *Michelin* to do so, must be rejected.

Finally, it has been suggested that we ignore the dictates of *Hooven I* as *Michelin* indicates at the very least the United States Supreme Court's intention presently to abandon the principles embodied in the former action. Were this court to comply with such a request, we would be guilty of overreaching. As was cogently stated in *Penfield Co. of California v. SEC* (C.A. 9, 1944), 143 F. 2d 746, at 749, certiorari denied (1944), 323 U.S. 768:

"We cannot agree that an inferior federal court may make its prognostication of the weather in the Supreme Court chambers, however well fortified in judicial reasoning, and forecast that the Supreme Court 'seems' about to overrule its prior decision, and outrun that Court to the overruling goal." Like the federal district and appellate courts, we are constrained to abide by the decisions of the nation's highest court until expressly overruled by that tribunal.

Finding the commissioner's levying of an *ad valorem* personal property tax upon the subject imported goods barred by the doctrine of collateral estoppel, we decline to address the constitutional issues raised by Hooven in its appeal.

Accordingly, the decision of the Board of Tax Appeals is affirmed.

Decision affirmed.

CELEBREZZE, C.J., W. BROWN, SWEENEY, LOCHER, HOLMES, C. BROWN and J.P. CELEBREZZE, JJ., concur.

BOARD OF TAX APPEALS
STATE OF OHIO

The Hooven & Allison Company,
Appellant,

vs.

CASE NOS. 79-C-637
79-C-638
(PERSONAL PROPERTY TAX)

Edgar L. Lindley,
Tax Commissioner of Ohio,
Appellee.

DECISION AND ORDER
Filed March 19, 1982

REPRESENTATIVES:

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For the Appellee - William J. Brown
Attorney General of Ohio
By: Richard Farrin
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30 East Broad Street
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Case Number 79-C-637 and Case Number 79-C-638 came on to be considered by the Board of Tax Appeals upon notices of appeal filed herein by the above named appellant on November 14, 1979. Said appeals are taken from a final order of the Tax Commissioner, dated October 17, 1979. The final order is evidenced by Certificate of Determination No. 14690 and relates to a personal property tax assessment for years 1976 and 1977.

The Tax Commissioner's final order in these matters reads as follows:

> "This proceeding, being the application of Hooven & Allison Company, Xenia, Greene County, Ohio for review and redetermination of the personal property tax assessments for the years 1976 and 1977, after being duly heard, came on to be considered for final determination.
>
> "The applicant is a manufacturer of cordage, importing certain quantities of raw material (hemp, sisal, jute, manila, etc.) each year from Tanzania, Ecuador, Kenya, Thailand, Bangladesh, et al. Such imported manufacturing inventory is ordered on credit from foreign producers and shippers through their brokers in various U.S. coastal cities, who then arrange for its transport by ocean-going vessel to the United States. Upon arrival in this country, the imports are transported overland by rail to the applicant's Xenia plant. At the Xenia plant, the bales of raw materials are placed in a warehouse and inspected, with payment then being made to the broker by pro forma invoice; any weight variations or quality grade differences discovered upon inspection result in a claim for partial refund. (However,

whether the materials are subsequently approved as inspected or a claim for damage or misgrading is filed, Hooven & Allison takes title to all the bales of materials when they are boarded overseas on the ocean-going vessels.) After complete tagging and inspection, the imported bales of raw materials are then stored in a dry area in their original packages until placed into production.

"The applicant timely filed its 1976 and 1977 Inter-County Corporation Returns of Taxable Property, reporting therein, *inter alia*, an average value of its manufacturing inventory located in Xenia City, Greene County pursuant to Section 5711.16 of the Revised Code; however, taking the position that its imported inventory, as addressed above, is exempt from taxation under the 'Import-Export' clause of the federal Constitution as long as it remains in its original packages, the applicant excluded such inventory in the computation of the average value of its taxable manufacturing inventory. [1]

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[1] The Applicant included the following footnote in Schedule 3 of its returns: "The inventories represent fibres imported by the taxpayer from foreign countries, held in the original packages in its warehouse in Xenia prior to being used in manufacturing cordage, and when they are removed therefrom or placed in the production line in the factory, such imported fibres so used, or removed from the original package, are thereupon transferred to the Goods in Process, and are included in the taxable inventories in Xenia City. . . the Supreme Court of the United States had held such fibres constitutionally immune from Ohio personal property taxes in the case of *The Hooven & Allison Co. v. Evatt*, 324 U.S. 652 (1945)."

"Upon audit, it was determined that County Auditor Bulletin No. 244, dated March 8, 1976, governed the applicant's 'excluded' imported inventory, and that such inventory, imported from a foreign source, for resale or for use in manufacturing was subject to Ohio's nondiscriminatory ad valorem personal property taxation since it was used in business in Ohio, was no longer in transit in interstate or foreign commerce and had attained a situs in Ohio on the subject tax-listing dates. Accordingly, such imported inventory was included in the computation of the average value of taxable manufacturing inventory pursuant to Section 5711.16 of the Revised Code, resulting in an increased valuation thereof as reflected in amended preliminiary assessment certificates issued pursuant to Section 5711.24 of the Revised Code.

"The applicant object to the increased assessments and timely filed an application for review and redetermination thereof pursuant to Section 5711.31, Revised Code, contending as follows: (1) The State of Ohio is collaterally estopped from assessing the applicant's imported raw materials inventory retained in its original packages on tax-listing date by the United States Supreme Court's decision in *Hooven & Allison Co. v. Evatt*, 324 U.S. 652 (1945). 'Because this decision has not been overruled by the United States Supreme Court (in *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976)) it is controlling precedent which is binding on the State of Ohio, its courts and its tax officials.' (parenthetical matter added); (2) The levying of Ohio's personal property tax in

this case operates to impair the federal government's regulation of foreign trade in contravention of the 'Import-Export' clause of the federal Constitution. *Department of Revenue of the State of Washington v. Association of Washington Stevedoring Companies, et al.*, 435 U.S. 734 (1978); The tax in its application acts to inhibit the applicant's importation of fibers from certain countries because it increases the per-pound cost differential between the applicant's U.S. processing and the foreign, internal processing of raw fibers imported from certain third-world nations with state-controlled, planned economies; (3) To the extent that the applicant's imported raw materials inventory exceeds its current operational needs, such excess is not 'used in business' within the context of Section 5701.08 of the Revised Code.

"Upon consideration of the information at hand and under the authority of Section 5711.31, Revised Code, the Tax Commissioner finds that the applicant's contentions are not well taken.

"In January of 1976, the United States Supreme Court held that a state's nondiscriminatory ad valorem personal property taxation of imported goods is not proscribed by the 'Import-Export' clause of the federal Constitution. *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976).[2] While not

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[2] See Southwestern U.L. Rev. 7:247-72, Summer '75 and J. Taxation 44:244-5, Ap '76 for analyses of the impact of the *Michelin* decision in the area of ad valorem personal property taxation of imported goods.

specifically reversing *Hooven & Allison, supra*, (which addressed manufacturing rather than merchandising inventory), the following rationale of the *Michelin* decision in the area of a state's nondiscriminatory personal property taxation of imported goods is equally persuasive, whether the goods are held for use in manufacturing or for resale:

> 'Nor will such taxation deprive the Federal Government of the exclusive right to all revenues from imposts and duties on imports and exports, since that right by definition only extends to revenues from exactions of a particular category; if nondiscriminatory ad valorem taxation is not in that category, it deprives the Federal Government of nothing to which it is entitled. Unlike imposts and duties, which are essentially taxes on the commercial privilege of bringing goods into a country, such property taxes are taxes by which a State apportions the cost of such services as police and fire protection among the beneficiaries according to their respective wealth; there is no reason why an importer should not bear his share of these costs along with his competitors handling only domestic goods. The Import-Export Clause clearly prohibits state taxation based on the foreign origin of the imported goods, but it cannot be read to accord imported goods preferential treatment that permits escape from uniform taxes imposed without regard to foreign origin for services which the State supplies.'

"In accordance with such policy, the Ohio Board of Tax Appeals has determined that, as a result of the U. S. supreme Court ruling in *Michelin Tire Corp., supra*, 'it is no longer necessary to determine whether imported goods have become mingled with domestic goods, or have been separated from their commercial unit of shipment, or have otherwise lost their status as imports and, therefore, become subject to state taxation (;) (r)ather, it is sufficient that the goods are no longer in transit and that the property tax sought to be assessed is nondiscriminatory.' *The Hammer Company v. Lindley*, B.T.A. Case No F-448 (April 9, 1979). See also *The Akron Distributing Company v. Lindley*, B.T.A. Case No. E-1593 (September 21, 1978).

"Accordingly, the Tax Commissioner finds no error in the assessments here under review.

"Finding no error in the assessments as heretofore made, it is the order of the Tax Commissioner that such assessments be, and the same hereby are affirmed. Pursuant to the provisions of Section 5711.31, Revised Code, the Tax Commissioner hereby issues this certificate of determination which is his final order with regard to the assessments here under review.

"In conformity with Sections 5711.31 and 5717.02, Revised Code, upon the expiration of thirty days from the date appearing on this certificate of determination, a copy hereof will be forwarded to the Auditor of State or proper county auditor, whichever is applicable."

Appellant's notices of appeal in each case are identical except that they relate to different tax years (1976 and 1977). Appellant's notice of appeal reads, in pertinent part, as follows:

"II. The Appellant specifies that such Certificate of Determination and the assessment shown thereon is erroneous in the following respects:

"1. The Commissioner erroneously included as taxable tangible personal property of Appellant certain raw materials inventory imported by Appellant from foreign sources for use in manufacturing, and retained by it in the original packages on tax-listing date, which was exempt from personal property taxation for the tax year involved.

"2. The Commissioner erroneously determined that the State of Ohio was not collaterally estopped by the United States Supreme Court decision in *The Hooven & Allison Co. v. Evatt*, 324 U.S. 652 (1945) from assessing the Appellant's imported raw materials inventory retained in its original packages on tax-listing date.

"3. The Commissioner erroneously determined that the levying of Ohio's personal property tax upon Appellant's imported raw materials inventory retained in its original packages on tax-listing date does not impair the federal government's regulation of foreign trade in contravention of the 'Import-Export' clause, or of the Commerce clause of the United States Constitution.

"4. The Commissioner erroneously determined that the Appellant's imported raw materials inventory which exceeded its current operational needs was 'used in business', within the meaning of Section

5701.08 of the Revised Code, in Ohio on tax-listing date and subject to personal property taxation under Section 5709.01 of the Revised Code.

"5. The foregoing Determination of the Tax Commissioner upholding the assessment for personal property taxes against Appellant for the Tax Year[s] 1976 [and 1977] is not supported by either the facts or the law, but is contrary to both the facts and the law.

"III. Wherefore Appellant prays that pursuant to Section 5717.02 of the Revised Code, the Board of Tax Appeals

"1. Reverse the Determination of the Tax Commissioner;

"2. Vacate the deficiency assessment against Appellant for personal property tax for the Tax Year[s] 1976 and [1977];

"3. Find and determine that the deficiency assessment for personal property taxes against Appellant for the Tax Year[s] 1976 [and 1977] is erroneous and illegal and that Appellant is not liable for such deficiency assessment; and

"4. Grant to Appellant such other and further relief to which it may be entitled.

"IV. Appellant hereby applies to the Board of Tax Appeals to order that a hearing of argument and evidence (in addtion to the record and evidence required to be certified to the Board of Tax Appeals by the Tax Commissioner) be held, pursuant to Section 5717.02 of the Revised Code."

(Bracketed material added by Board)

This matter was submitted to the Board of Tax Appeals upon the notices of appeal, the statutory transcript filed by the appellee pursuant to Section 5717.02, Ohio Revised Code, and the briefs submitted by counsel for the parties and other evidence. By agreement of the parties, the evidentiary hearing before this Board has been waived.

These matters have been consolidated, sua sponte, for resolution.

Appellant, the Hooven & Allison Company, (hereafter HAC) is an Ohio corporation with its principal place of business being located in Xenia, Ohio. Further facts about HAC and additional information as to the origination of these appeals are stated by appellee in his Certificate of Determination. Said Certificate of Determination has heretofore been reproduced and therefore, there exists no need to do so again.

At pages 6 and 7 of HAC's Requested Findings of Fact and Brief of Appellant, it is noted that two issues are presented in this appeal. They are:

> "1. Is the State of Ohio collaterally estopped by the decision of the United States Supreme Court in *Hooven & Allison Co. v. Evatt*, 324 U.S. 652 (1945), from assessing the personal property tax imposed by Ohio Revised Code Ch. 5711 on Appellant's imported raw materials inventory retained in its original packages on tax-listing day?
>
> "2. In the alternative, does the levying of Ohio's personal property tax upon Appellant's imported raw materials inventory retained in its original packages on tax-listing day impair the Federal Government's regulation of foreign trade

> or disrupt the harmonious relations of the several states in contravention of the 'Import-Export' clause (Article I, § 10, cl. 2) or the Commerce clause (Article I, § 8, cl. 3) of the United States Constitution?"

Further, HAC properly notes, at page 7 of the above brief that:

> "The second issue presented by this appeal is strictly a constitutional question. Although Appellant recognizes that the Board may not consider this question, Appellant is raising it in this action so that it may preserve its specification of error concerning this point."

See: *S.S. Kresge Co. v. Bowers*, 170 Ohio St. 405 (1960).

The first issue concerns the doctrine of collateral estoppel. This doctrine was explained by the Court in *Whitehead v. General Telephone Co.*, 20 Ohio St. 2d 108 (1969). At page 112, the Court stated:

> "The second aspect of the doctrine of *res judicata* is 'collateral estoppel.' While the merger and bar aspects of *res judicata* have the effect of precluding a plaintiff from relitigating the same cause of action against the same defendant, the collateral estoppel aspect precludes the relitigation, in a second action, of *an issue* that has been actually and necessarily litigated and determined in a prior action which was based on a different cause of action. Restatement of the Law, Judgments, Section 45, comment (c), and Section 68 (2); *Cromwell v. County of Sac* (1876), 94 U.S.

> 351. In short, under the rule of collateral estoppel, even where the cause of action is different in a subsequent suit, a judgment in a prior suit may nevertheless affect the outcome of the second suit."

The Court further explained the doctrine of collateral estoppel in the case of *State, ex rel. Westchester v. Bacon*, 61 Ohio St. 2d 42 (1980). At page 44, the Court stated:

> "*Res judicata* is the sole basis given for the decisions below. In order for a prior decision to act as a bar there must be identity of parties or their privies and identity of issues. *Whitehead v. Genl. Tel. Co.* (1969), 20 Ohio St. 2d 108. If the prior cause of action involves identical issues, then that prior cause of action is conclusive of the rights, questions and facts in issue as between the parties or their privies. If identical causes of action are involved, the prior action is *res judicata*. If different causes of action are involved but some issues are identical, the earlier decision can be used to bar litigation of identical issues in the later case under the doctrine of collateral estoppel."

Further, the Court in *State, ex rel. Westchester* spoke to the impact of a change in circumstances as to collateral estoppel. The Court stated:

> "In *Trautwein, supra*, this court ruled that where the material issue had been disposed of in an earlier action, an alleged change of circumstances did not necessarily prevent the doctrine of *res judicata* or collateral estoppel from barring a later cause of action. Where, however, there

has been a change in the facts in a given action which either raises a new material issue, or which would have been relevant to the resolution of a material issue involved in the earlier action, neither the doctrine of *res judicata* nor the doctrine of collateral estoppel will bar litigation of that issue in the later action."

(at page 45)

Here, HAC argues that appellee is collaterally estopped by the decision of the U.S. Supreme Court in *Hooven & Allison Co. v. Evatt*, 324 U.S. 652 (1945), (hereinafter *Hooven I*) from assessing the personal property tax for tax years 1976 and 1977 imposed on HAC's imported raw materials inventory retained in its original packages on tax listing day. The facts relied on by HAC are stated at pages 12 and 13 of its primary brief. There it is stated:

"In 1945, the United States Supreme Court found that Appellant was the importer of raw materials under contracts that it entered into with the United States brokers of foreign producers and shippers of those materials (*Hooven & Allison Co. v. Evatt, supra* at 664). The Certificate of Determination of the Tax Commissioner appealed from herein states that Appellant imports the raw materials in question (S.T. 60). The Certificate of Determination admits that these raw materials '[a]fter complete tagging and inspection, . . . are. . .stored in a dry area in their original packages until placed into production' (S.T. 60), as were the imported raw materials of Appellant that the Supreme Court in 1945 held to be immune from property taxation (*Hooven & Allison Co. v. Evatt, supra* at 654).

"At no point does the record dispute that the facts of importation, storage and use in 1975 and 1976 of the imported raw materials which the Tax Commissioner now seeks to subject to the Ohio personal property tax are identical in all material respects to those upon which the Supreme Court of the United States decided in 1945 that similar inventory of Appellant present in its warehouse in 1938, 1939 and 1940 was constitutionally immune from the imposition of the same Ohio personal property tax under the Import-Export clause of the United States Constitution. Indeed, in view of what has been stated above, one could scarcely dispute this point. The pertinent facts for 1975 and 1976 are simply no different from those that were at issue in the earlier years which were before the United States Supreme Court in *Hooven & Allison Co. v. Evatt.*"

The evidence before the Board of Tax Appeals establishes that the parties involved in this matter are identical to those involved in *Hooven 1.* The taxability of raw materials issue involved in the case at bar was also an issue in *Hooven 1.* The raw materials and the type of taxation involved in this cause are identical to those involved in *Hooven 1. Hooven 1* has not been reversed by the U.S. Supreme Court and thus, has the force and effect of law. Under the doctrine of collateral estoppel, litigation of the instant [taxability of the involved raw materials] issue is barred in this matter and the exemption from taxation was improperly held to be unavailable.

Accordingly, it is the decision and order of the Board of Tax Appeals that the decisions of the appellee in Case Numbers 79-C-637 and 79-C-638 should be, and hereby are, reversed.

I hereby certify the foregoing to be a true and correct copy of the action of the Board of Tax Appeals of the State of Ohio, this day taken, with respect to the above matter.

/s/ Robert E. Boyd, Jr.
Chairman

lah

DEPARTMENT OF TAXATION OF OHIO

Bulletin No. 244

March 8, 1976

TO: ALL COUNTY AUDITORS

FROM: Edgar L. Lindley, Tax Commissioner

RE: Personal Property Taxation of Foreign Imports

A recent decision of the United States Supreme Court has drastically changed the applicability of the Ohio personal property tax to property imported from foreign sources.

In *Michelin Tire Corp. v. Wages, Tax Commissioner*, et al., January 14, 1976, 96 S. Ct. 535, 46 L. Ed. 2d 495, the United States Supreme Court held that personal property imported from a foreign source is subject to a state's non-discriminatory ad valorem (property) tax in the same manner as domestic property.

Prior to this decision foreign imports were considered immune from state and local property taxes so long as they had not become a part of the mass of general property within a state. Previously, the determining factors were whether such property was still in the original package in which it was imported or, in the case of goods imported for use in manufacturing, whether such property was necessary to meet the current operational needs of the importer.

As the result of the *Michelin* decision, all property imported from a foreign source, whether it be for resale or for use in manufacturing, is subject to the Ohio personal property tax provided:

1.) the property is used in business as provided by Section 5701.08, Ohio Revised Code, and

2.) the property is no longer in transit in interstate or foreign commerce, and

3.) the property has a situs in a taxing district in Ohio.

All personal property tax returns for the years 1976 and thereafter shall be prepared and filed in accord with these principles.

No. 83-96

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JOANNE LIMBACH,
TAX COMMISSIONER OF OHIO,
Petitioner,

v.

THE HOOVEN & ALLISON COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF OHIO

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JULY 15, 1983
CERTIORARI GRANTED OCTOBER 3, 1983

TABLE OF CONTENTS

The following opinions, decisions, judgments and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

November 14, 1979	Notices of Appeal filed by Appellant (respondent herein) with the Board of Tax Appeals.
November 14, 1979	Motion to consolidate Case No. 79-C-637 with 79-C-638.
December 21, 1979	Transcript of Appellee (petitioner herein) filed with the Board of Tax Appeals.
March 19, 1982	Entry and Decision of the Board of Tax Appeals.
April 16, 1982	Notice of Appeal to the Supreme Court of Ohio filed by Appellant with the Board of Tax Appeals.
April 16, 1982	Notice of Appeal to the Supreme Court of Ohio filed by Appellant with the Supreme Court of Ohio.
April 19, 1982	Notice of Appeal to the Supreme Court of Ohio filed by Appellee with the Board of Tax Appeals.
April 19, 1982	Notice of Appeal to the Supreme Court of Ohio filed by Appellee with the Supreme Court of Ohio.
April 20, 1982	Opinion of the Supreme Court of Ohio.

Case No. 83-96

IN THE

Supreme Court of the United States

October Term 1982

JOANNE LIMBACH,
TAX COMMISSIONER OF OHIO,

Petitioner,

v.

THE HOOVEN & ALLISON COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

In attempting to fashion an argument in support of its position that this Court should issue its writ of certiorari, petitioner strives to characterize the opinion of the Ohio Supreme Court as being somehow revolutionary. In fact, the Supreme Court of Ohio simply followed a proposition of law which is unassailable. The Supreme Court of Ohio quite properly held that the decision of this Court in *Hooven & Allison Co.* v. *Evatt*, 324 U.S. 652 (1945), is controlling until such time, if ever, as this Court overrules that decision. Such deference by a state court to the decision of this Court on a question of federal law is hardly revolutionary and cannot possibly provide a basis for the issuance of a writ of certiorari.

Petitioner is really arguing that this Court must have intended to overrule its decision in *Hooven* when it decided *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276 (1976). However, as the Supreme Court of Ohio correctly noted, this Court very clearly indicated in *Michelin* that it was overruling only its decision in *Low* v. *Austin*, 80 U.S. (13 Wall.) 29 (1872). *Michelin*, 423 U.S. at 301. This Court did not overrule its prior decision in *Hooven*. Indeed, this Court in *Michelin* acknowledged its awareness of its decision in *Hooven*, but stated that the *Hooven* decision had raised constitutional questions in another context. *Michelin*, 423 U.S. at 301, n. 13.

The issue before this Court in *Michelin* was limited to the facts respecting imported tires held for sale. The Court expressly stated that the issue of the right of a state to tax imported tubes held for subsequent incorporation into tires was not before it. *Michelin*, 423 U.S. at 279, n. 2. The issue in this case of state taxation of imported raw materials held in inventory for use in manufacturing was thus not decided in *Michelin*. This Court followed

traditional jurisprudential principles in limiting its analysis to the issue which was in fact before it and did not resolve different issues which were not factually developed and which were not in fact before it.

The issues raised in this case with respect to a state's attempt to tax imported raw materials which are yet to be incorporated into a saleable product are very different from the issues raised in *Michelin* by a tax on finished goods. Hooven & Allison Company must import the fiber materials, such as hemp, sisal and jute, used in its various rope products. In doing so, it is compelled to pay a premium price in order to obtain these fibers, because the third world countries which export fibers impose a pricing structure that attempts to encourage rope manufacturers to locate their production facilities in those third world countries. Certain third world countries also sell finished rope products for export at prices very close to the prices set for exported fibers. In this manner, the third world countries seek to discriminate against exported raw materials in favor of exported finished rope products.

Despite this economic premium which is exacted, Hooven & Allison Company has resisted the pressure to move its operations overseas and has maintained its manufacturing facilities in Ohio. The impact of a state property tax in this situation is very different from the situation presented in *Michelin*, in which Michelin Tire Company was perceived to have an advantage over domestic tire manufacturers when it was insulated from personal property taxes on its inventory of finished goods held for sale. There are no domestic producers of those types of fibers imported by Hooven & Allison Company, and thus the economic issues are very different. These economic differences underscore the wisdom with which this Court acted in limiting its decision in *Michelin* to the facts in that case,

and in deciding not to overrule its prior decision in *Hooven*.

The other arguments advanced by petitioner are also unpersuasive. Petitioner argues that the Supreme Court of Ohio ignored the decision of this Court in *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591 (1948). The *Sunnen* decision was not ignored; it was simply not applicable. *Sunnen* stands for nothing more than the proposition that tax issues can change in different tax years. *Sunnen* does not indicate that controlling principles of federal constitutional law enunciated by this Court should be ignored by a state court. Thus, this Court in *Montana v. United States*, 440 U.S. 147 (1979), limited the *Sunnen* doctrine to situations in which the controlling law or the relevant facts had changed materially. Otherwise, a prior decision on the identical tax issue was held to be dispositive in any attempt to relitigate the same issue. In this case, the facts and the law have not changed materially since this Court decided *Hooven*. Therefore, *Sunnen* is not pertinent to this case.

Petitioner also argues that the impact of the decision by the Supreme Court of Ohio is unfair because it somehow extends a protection to Hooven & Allison Company which no other company enjoys. This argument is ridiculous. The Supreme Court of Ohio held only that this Court has not overruled *Hooven*. Consequently, any taxpayer who believes that *Hooven* articulates the controlling principle of law in its case can rely on *Hooven*. Its impact is in no way limited to respondent. Indeed, petitioner contradicts its own argument by also attempting to attribute importance to this case by claiming that other companies are placing reliance on the decision. Since *Hooven* continues to express the controlling principles of law as enunciated by this Court, it is hardly surprising that other taxpayers are citing the decision.

In the final analysis, petitioner is really arguing only that this Court should re-examine its decision in *Hooven*. However, petitioner advances no reason in support of such re-examination. Petitioner ignores the economic differences between the competitive advantage at issue in *Michelin* and the competitive disadvantage which Hooven & Allison Company would suffer in relation to domestic manufacturers of synthetic cordage and foreign manufacturers of natural fiber cordage if its imported raw materials were subject to state property tax when there is no domestic source for such raw materials. Rather than stating any reasons in support of a need to re-examine *Hooven*, petitioner tries to convince the Court that it has somehow already implicitly overruled *Hooven* even though it refrained from doing so expressly. The fact is that the issues in this case are very different from those considered in *Michelin*. Therefore, petitioner has not established any reason for this Court to re-examine *Hooven*.

Moreover, this case would provide a very poor vehicle for any re-examination of *Hooven* because of the absence of any factual record. Since petitioner chose to argue below that *Hooven* had already been overruled, petitioner made no attempt to develop a factual record as to why the case should be overruled. The Supreme Court of Ohio quite properly held that *Hooven* had not been overruled. Accordingly, the Supreme Court of Ohio did not attempt to develop or review a factual record. Hence, even if *Hooven* were to be re-examined, this case would provide no basis for any meaningful review, because petitioner did not develop a factual record in the Ohio litigation. Therefore, this case does not provide the factual record necessary for proper consideration of the constitutional questions presented by state taxation of imported raw materials held for use in manufacturing.

CONCLUSION

The Supreme Court of Ohio did nothing more than follow an unassailable proposition of law: A state court must follow a controlling decision of this Court on an issue of federal law. Petitioner tried to argue before the Supreme Court of Ohio that the *Hooven* decision had been implicitly overruled, but this argument was properly rejected. This Court has never overruled *Hooven*. Further, because petitioner did not develop a factual record on the constitutional issues, this case would totally fail to provide any meaningful basis for re-examining *Hooven*, even if such re-examination were thought to be desirable. Finally, no need whatsoever has been shown for any such re-examination of *Hooven*. Therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari have been served on petitioner by forwarding such copies to Richard C. Farrin, 30 East Broad Street, Columbus, Ohio 43215, Counsel for petitioner, by United States mail, this 17th day of August, 1983. I further testify that all parties required to be served have been served.

Michael A. Nims
Attorney for Respondent

No. 83-96

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JOANNE LIMBACH,
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v.

THE HOOVEN & ALLISON COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF OHIO

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE STATE OF OHIO CAN IMPOSE ITS NONDISCRIMINATORY AD VALOREM PROPERTY TAX ON IMPORTED RAW MATERIALS NO LONGER IN TRANSIT WHICH ARE RETAINED IN THEIR ORIGINAL PACKAGES AND HELD FOR USE IN MANUFACTURE IN OHIO WITHIN THE STRICTURES OF THE IMPORT-EXPORT CLAUSE OF THE UNITED STATES CONSTITUTION, ART. I, § 10, cl. 2.

II. WHETHER THE DECISION OF THIS COURT IN *MICHELIN TIRE CORP. v. WAGES*, 423 U.S. 276 (1976), EFFECTED A CHANGE IN THE CONTROLLING LEGAL PRINCIPLES APPLICABLE TO A DETERMINATION OF WHETHER OHIO'S ASSESSMENT OF ITS AD VALOREM PROPERTY TAX AGAINST IMPORTED RAW MATERIALS VIOLATES THE IMPORT-EXPORT CLAUSE.

III. WHETHER SUBSEQUENT TO *MICHELIN* THE DECISION OF THIS COURT IN *HOOVEN & ALLISON CO. v. EVATT*, 324 U.S. 652 (1945), RETAINS ANY VITALITY REGARDING THE ABILITY OF THE STATES TO TAX IMPORTED RAW MATERIALS.

IV. WHETHER COLLATERAL ESTOPPEL MAY BE APPLIED WHEN IT WOULD RESULT IN ONE MANUFACTURER BEING PERPETUALLY IMMUNE FROM OHIO'S AD VALOREM PROPERTY TAX ON ITS IMPORTED RAW MATERIALS WHILE ALL OTHER BUSINESSES' IMPORTED GOODS, INCLUDING RAW MATERIALS, WOULD BE SUBJECT TO THAT TAX BECAUSE OF A SUBSEQUENT CHANGE IN THE CONTROLLING LEGAL PRINCIPLES APPLICABLE TO

IMPORT-EXPORT CLAUSE CASES ENUNCIATED IN AN INTERVENING DECISION OF THIS COURT.

PARTIES

The petitioner in this action is Joanne Limbach in her capacity as Tax Commissioner of Ohio. She is the successor to Edgar L. Lindley who in his capacity as Tax Commissioner of Ohio was a party to the proceedings below. The respondent is The Hooven & Allison Company.

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BRIEF FOR THE PETITIONER

DECISIONS BELOW

The Decision of the Ohio Supreme Court is reported at *Hooven & Allison Company v. Lindley*, 4 Ohio St. 3d 169, 447 N.E. 2d 1295 (1983). (Pet. App. A—2). The Decision and Order of the Ohio Board of Tax Appeals is unreported. (Pet. App. A—10).

JURISDICTION

The Decision of the Ohio Supreme Court was entered as its judgment on April 20, 1983. (Pet. App. A–2). The Petition for Certiorari was filed on July 15, 1983, and was granted on October 3, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Article I, § 10, cl. 2 of the United States Constitution, and Ohio Revised Code (R.C.) sections 5709.01, 5711.01 (A) and 5711.16

Article I, § 10, cl.2 of the United States Constitution:

> No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

R.C. § 5709.01:

> All real property in this state is subject to taxation, except only such as is expressly exempted therefrom. All personal property located and used in business in this state, and all domestic animals kept in this state and not used in agriculture, except unmanufactured tobacco which shall be exempt from taxation for state purposes to the extent of the value, or amounts, of any unpaid nonrecourse loan or loans thereon granted by the United States government or any agency thereof, are subject to taxation, regardless of the residence of the owners thereof. All ships, vessels, and boats, and all shares and interests therein, defined in section 5701.03 of the Revised Code as

personal property and belonging to persons residing in this state and not used in in business wholly in another state, other than aircraft licensed in accordance with sections 4561.17 to 4561.21, inclusive, are subject to taxation. All property mentioned as taxable in this section shall be entered on the general tax list and duplicate of taxable property.

R.C. § 5711.01 (A):

(A) "Taxable property" includes all the kinds of property, except real property mentioned in section 5709.01 and 5709.02 of the Revised Code, and also the amount or value as of the date of conversion of all taxable property converted into bonds or other securities not taxed on or after the first day of November in the year preceding deposits after the date of which deposits are required to be listed in such year, except in the usual course of the taxpayer's business, to the extent he may hold or control such bonds, securities, or deposits on such day, without deduction for indebtedness created in the purchase of such bonds or securities from his credits; but taxable property does not include such investments and deposits as are taxable at the source as provided in sections 5725.01 to 5725.26 of the Revised Code, nor surrender values under policies of insurance.

R.C. § 5711.16:

A person who purchases, receives, or holds personal property for purpose of adding to its value by manufacturing, refining, rectifying, or combining different materials with a view of making a gain or profit by so doing is a manufacturer. When such person is required to return a statement of the amount of his personal property used in business, he shall include the average value, estimated as provided in this section, of all articles purchased, received, or otherwise held for the purpose of being used, in whole or in part, in manufacturing, combining, rectifying, or refining, and of all articles which were at any time by him manufactured or changed in any way, either by combining, rectifying, refining or adding thereto, which he has on hand during the year ending on the day such property is listed for taxation annually, or on the part of the year during which he was engaged in business. He shall separately list finished products not kept or stored at the place of manufacture or at a warehouse in the same county.

The average value of such property shall be ascertained by taking the value of all property subject to be listed on the average basis, owned by such manufacturer on the last business day of each month the manufacturer was engaged in business during the year. The result shall be the average value to be listed. A manufacturer shall also list all engines and machinery, and tools and implements, of every kind used, or designed to be used, in refining and manufacturing, and owned or used by such manufacturer.

STATEMENT OF THE CASE

Petitioner, the Tax Commissioner of Ohio, assessed ad valorem personal property taxes under R.C. Chapter 5711 against certain raw materials imported by respondent, The Hooven & Allison Co., from various foreign countries and retained in their original packages by respondent in its warehouse in Ohio for their intended use by respondent in the manufacture of cordage.

In its Inter-County Corporation Returns of Taxable Property for return years 1976 and 1977, respondent had deducted imported raw materials retained in their original packages from its manufacturing inventory, giving the following explanation:

> The inventories represent fibres imported by the taxpayer from foreign countries, held in the original packages in its warehouse in Xenia prior to being used in manufacturing cordage, and when they are removed therefrom or placed in the production line in the factory, such imported fibres so used, or removed from the original package, are thereupon transferred to the Goods in Process, and are included in the taxable inventories in Xenia City.

Subsequent to the assessment, respondent filed an application for review and redetermination of the assessment, arguing that the Import-Export Clause of the United States Constitution precludes, and the decision of this Court in *Hooven & Allison Co. v. Evatt*, 324 U.S. 652 (1945) (hereinafter *Hooven I*) collaterally estops, the Tax Commissioner from levying Ohio's ad valorem personal property taxes upon the subject imported raw materials. In the

Certificate of Determination affirming the assessment, the Tax Commissioner rejected respondent's arguments on the basis of this Court's decision in *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976). The Certification of Determination is set forth in full in the Decision and Order of the Board of Tax Appeals (Pet. App.A-11.)

Respondent appealed to the Ohio Board of Tax Appeals from the Tax Commissioner's Certificate of Determination specifying the following errors, *inter alia*, in its notice of appeal:

> 2. The Commissioner erroneously determined that the State of Ohio was not collaterally estopped by the United States Supreme Court decision in *The Hooven & Allison Co. v. Evatt*, 324 U.S. 652 (1945) from assessing the Appellant's imported raw materials inventory retained in its original packages on tax-listing date.
>
> 3. The Commissioner erroneously determined that the levying of Ohio's personal property tax upon Appellant's imported raw materials inventory retained in its original packages on tax-listing date does not impair the federal government's regulation of foreign trade in contravention of the "Import-Export" clause, or of the Commerce clause of the United States Constitution.

The Board of Tax Appeals held that the Tax Commissioner was collaterally estopped by the decision of this Court in *Hooven I*. Although the Tax Commissioner, relying on this Court's decision in *Commissioner v. Sunnen*, 333 U.S. 591 (1948), argued before the Board of Tax Appeals that collateral estoppel was inapplicable because the legal principles upon which *Hooven I* was based had been abandoned by the decision of this Court in *Michelin Tire Corp. v. Wages, supra*, the Board's de-

cision contained no reference to that decision or its effect on the application of collateral estoppel based on *Hooven I*. The Board of Tax Appeals did not consider the constitutional issues raised by respondent, stating that it lacked jurisdiction to determine those issues. (Pet. App. A-10).

Respondent filed a notice of appeal from this decision to the Ohio Supreme Court to secure a determination on its constitutional claims. The Tax Commissioner filed a notice of appeal from the decision to the Ohio Supreme Court, specifying the following error:

> The Board erred in holding that the Tax Commissioner is collaterally estopped by the decision of the United States Supreme Court in *Hooven & Allison Co. v. Evatt*, 324 U.S. 652 (1945), from assessing the personal property tax for the tax years 1976 and 1977 on taxpayer's imported raw materials inventory retained in its original packages on tax listing day and, based on such holdings, deciding that the final determination of the Tax Commissioner in issue in BTA Case Nos. 79-C-637 and 79-C-638 should be reversed.

The Tax Commissioner argued before the Ohio Supreme Court that this Court's decision in *Michelin* so changed the legal principles controlling in Import-Export Clause cases as to render the doctrine of collateral estoppel inapplicable, relying on this Court's decision in *Commissioner v. Sunnen, supra*.

The Ohio Supreme Court rejected the Tax Commissioner's argument that collateral estoppel was inapplicable because *Michelin* had repudiated the "original package" doctrine upon which *Hooven I* was based and affirmed the decision of the Board of Tax Appeals that the Tax

Commissioner was collaterally estopped from assessing respondent's imported raw materials. Having held that the Tax Commissioner was barred by the doctrine of collateral estoppel from levying Ohio's ad valorem personal property tax on respondent's imported raw materials, the Ohio Supreme Court declined to address the constitutional issues raised by respondent in its appeal. (Pet. App. A-2).

SUMMARY OF ARGUMENT

I. In *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976), this Court held that a state nondiscriminatory ad valorem personal property tax was not the type of exaction which the Framers of the Constitution considered as being an "impost" or "duty" and that such a tax was therefore not within the prohibition of Article I, section 10, clause 2 of the Constitution of the United States, the Import-Export Clause, against the laying of "any Imposts or Duties on Imports." This holding was based upon this Court's exhaustive historical analysis of the Import-Export Clause and its conclusion that the imposition of a nondiscriminatory ad valorem property tax on imported goods would not offend any of the three objectives of the Import-Export Clause.

Michelin adopted a fundamentally different approach to Import-Export Clause cases. *Washington Revenue Dept. v. Association of Washington Stevedoring Cos.*, 435 U.S. 734, 752. Specifically abandoned was the concept that the Import-Export Clause constituted a broad prohibition against all forms of state taxation which fell on imports. *Michelin Tire Corp. v. Wages*, *supra*, at 290-291. Until *Michelin*, this concept had been applied to prohibit any state tax on goods imported until those goods had lost their status as imports. The primary doctrine that was formalized to determine when goods had lost their status was the "original package" doctrine. For over a century after the enunciation of this doctrine in *Low v. Austin*, 13 Wall. 29 (1872), it was the basic legal principle applied in Import-Export Clause cases to determine whether state exactions on imported goods were constitutionally permitted.

Michelin expressly overruled *Low v. Austin*, *supra*, and rejected the controlling legal principle upon which *Low* was based, the "original package" doctrine. This rejection

of the controlling legal principle of *Low* also overruled in principle all of the cases decided subsequent to *Low v. Austin* which were based on that controlling legal principle. *Hooven & Allison Co. v. Evatt*, 324 U.S. 652 (1945) (*Hooven I*) was among those cases which were decided on the basis of the "original package" doctrine formalized in *Low v. Austin*, and therefore retains no vitality subsequent to *Michelin*.

The narrow reading and application of *Michelin* by the Ohio Supreme Court in the decision below ignored the historic nature of the *Michelin* Court's abandonment of the century-old "original package" doctrine. *Michelin* changed the entire focus of Import-Export Clause cases from the nature of the goods as imports to the nature of the tax at issue. Subsequent to *Michelin*, the determinative question in Import-Export Clause cases is no longer whether the goods have lost their status as imports but rather whether the tax sought to be imposed was an "impost" or "duty."

Hooven I held that a nondiscriminatory state ad valorem personal property tax could not be imposed within the strictures of the Import-Export Clause until such goods lost their status as imports by being removed from their original packages. Clearly, this holding is in direct conflict with *Michelin's* holding that such a tax was not an "impost" or "duty" and was therefore not prohibited by the Import-Export Clause regardless of whether the goods upon which such tax was levied had lost their status as imports. Because of this direct conflict between *Michelin* and *Hooven I*, the latter case has unquestionably been overruled in principle by *Michelin* and the Ohio Supreme Court's finding that *Hooven I* remains currently valid was clearly erroneous.

Affirmance of the decision below would effect a resurrection of the "original package" doctrine and would result in preferential treatment being accorded to manufacturers

who use imported rather than domestic raw materials. It will allow such manufacturers to avoid paying their fair share for the services provided by the state and require local taxpayers to subsidize those services provided to those manufacturers. *Michelin* expressly stated that the Import-Export Clause could not be read in such a manner as to allow such preferential treatment.

II. At the very least, *Michelin* effected a change in the controlling legal principle upon which *Hooven I* was based, the "original package" doctrine, and under this Court's decision in *Commissioner v. Sunnen*, 333 U.S. 591 (1948), *Hooven I* was no longer conclusive and the doctrine of collateral estoppel was rendered inapplicable. In *Sunnen*, this Court held that collateral estoppel is not applicable where there has been a modification or change in the controlling legal principles effected by an intervening decision of this Court. This limitation on the applicability of collateral estoppel is particularly compelling in the instant case because *Michelin* did more than modify or change the "original package" doctrine, it specifically repudiated that doctrine.

In its decision below, the Ohio Supreme Court failed to properly apply this Court's decision in *Sunnen*, even though it apparently recognized that *Michelin* had repudiated the "original package" doctrine. This failure to follow the dictates of *Sunnen* will lead to the very tax inequality which *Sunnen's* admonitions were designed to avoid. Hooven & Allison Company will be forever immune from taxation on its imported goods because of a decision based upon a now repudiated legal doctrine while all other taxpayers' liability will be determined upon the basis of the fundamentally different approach adopted by *Michelin*. Such a result should not be countenanced by this Court.

ARGUMENT

I. Ohio's Assessment of its Nondiscriminatory Ad Valorem Property Tax Against Imported Goods No Longer in Transit and Held in Ohio for Use in Manufacture Is Not Within the Prohibition of the Import-Export Clause Against the Laying by States of "any Imposts or Duties on Imports."

In 1976, this Court issued an historic decision, *Michelin Tire Corp. v. Wages*, 423 U.S. 276, which repudiated a century-old doctrine, the "original package" doctrine, and completely changed the legal analysis to be applied in Import-Export Clause cases. *Michelin* held that the Import-Export Clause prohibited only the imposition of "Imposts and Duties on Imports" and that a state nondiscriminatory ad valorem property tax was not such an exaction and was not therefore prohibited by the Import-Export Clause.

The decision of the Ohio Supreme Court that the Tax Commissioner of Ohio was collaterally estopped from assessing Ohio's ad valorem property tax against respondent's imported raw materials was apparently based upon its holding that the decision of this Court in *Hooven & Allison Co. v. Evatt*, 324 U.S. 652 (1945)(Hooven I), in which such goods were held to be immune from that tax under the "original package" doctrine, was of continued vitality subsequent to this Court's decision in *Michelin*. That holding is in direct conflict with the *Michelin* decision.

For over a century following this Court's decision in *Low v. Austin*, 13 Wall. 29 (1872), wherein the "original package "doctrine was spawned, the Import-Export Clause was viewed as a broad prohibition against all taxes on imports. *Washington Revenue Dept. v. Association of Washington Stevedoring Cos.*, 435 U.S. 734, 752 (1978); P. Hartman, *Federal Limitations on State and Local Taxation* § 5:2, at 192-193, § 5:4, at 199; W. Hellerstein, *State*

Taxation and the Supreme Court: Toward a More Unified Approach to Constitutional Adjudication?, 75 Mich. L. Rev. 1426 (1977). The primary consideration in such cases was whether the challenged tax reached imports; the question to be decided was whether the goods had lost their status as imports. *Washington Revenue Dept. v. Association of Washington Stevedoring Cos., supra*, at 752, 760. Until *Michelin*, imported goods retained their status as imports so long as they remained in their original packages, and as imports they were considered to be immune from all forms of state taxation under the Import-Export Clause.

In *Michelin*, this Court expressly overruled *Low v. Austin, supra*, and abandoned the century-old "original package" doctrine along with the concept that the Import-Export Clause constituted a broad prohibition against all forms of state taxation which fall upon imports. 423 U.S., at 279, 290 and 301; *Washington Revenue Dept. v. Association of Washington Stevedoring Cos., supra*, at 760; P. Hartman, *supra*, § 5:4 at 198-199; W. Hellerstein, *supra*, at 1429-1430.

This abandonment constituted an historic break from the controlling legal principles upon which the determinations regarding the application of the Import-Export Clause had been based. *Michelin* adopted a fundamentally different approach to Import-Export Clause cases. Rather than looking at whether the goods had lost their status as imports, the Court focused upon the nature of the tax being challenged to ascertain whether it was an "Impost or Duty" forbidden by the Import-Export Clause. *Washington Revenue Dept. v. Association of Washington Stevedoring Cos., supra*, at 752; P. Hartman, *supra*, at § 5:4, at 198-199; W. Hellerstein, *supra*, at 1429-1430.

The *Michelin* Court looked to the purposes behind the inclusion of the Import-Export Clause in the Constitution

and determined that nondiscriminatory state ad valorem property taxes were not the type of exactions the Framers of the Constitution considered as creating the three main concerns or evils the clause was intended to eliminate:

> Our independent study persuades us that a nondiscriminatory ad valorem property tax is not the type of state exaction which the Framers of the Constitution or the Court in *Brown* had in mind as being an "impost" or "duty" and that *Low v. Austin's* reliance upon the *Brown* dictum to reach the contrary conclusion was misplaced.
>
> 423 U.S., at 283.

The *Michelin* Court's overruling of *Low v. Austin, supra,* was based upon a cogent historical analysis of the original purpose and scope of the Import-Export Clause. This analysis focused on whether a nondiscriminatory ad valorem property tax would impair any of the three main objectives of the Framers:

> [T]he Federal Government must speak with one voice when regulating commercial relations with foreign governments, and tariffs, which might affect foreign relations, could not be implemented by the States consistently with that exclusive power; import revenues were to be the major source of revenue of the Federal Government and should not be diverted to the States; and harmony among the States might be disturbed unless seaboard States, with their crucial ports of entry, were prohibited from levying taxes on citizens of other States by taxing goods merely flowing through their ports to the inland States not situated as favorably geographically.
>
> 423 U.S., at 285-286.
> (footnotes omitted)

Determining that such a tax would offend none of these objectives, the Court concluded that "[n]othing in the history of the Import-Export Clause even remotely suggests that a nondiscriminatory ad valorem property tax which is also imposed on imported goods that are no longer in import transit was the type of exaction that was regarded as objectionable by the Framers of the Constitution." *Id.*, at 286. Having held that the prohibition of the Import-Export Clause was only against the laying of "Imposts or Duties," and that a nondiscriminatory state ad valorem property tax was not such an exaction, the Court held that irrespective of whether the tires had lost their status as imports, Georgia's assessment of its nondiscriminatory ad valorem property tax against the imported tires was not prohibited by the Import-Export Clause.

Although the *Michelin* Court expressly overruled only *Low v. Austin*, which it considered to be the leading decision applying the "original package" doctrine (423 U.S. at 282), its decision implicitly overruled all of the cases decided subsequent to *Low v. Austin* which applied the rationale of that case and unquestionably changed the controlling legal principles applicable in Import-Export Clause cases. Among such cases applying the "original package" analysis of *Low v. Austin* was *Hooven I.* This is clearly evidenced by a review of the following statement in *Hooven I.*:

> Although one Justice dissented in *Brown v. Maryland, supra,* from that day to this, this Court has held, without a dissenting voice, that things imported are imports entitled to the immunity conferred by the Constitution; that that immunity survives their arrival in this country and continues until they are sold, removed from the original package, or put to the use for which they are imported. *Waring v. The Mayor,*

supra, 122-123; *Low v. Austin*, 13 Wall. 29, 32-33; *Cook v. Pennsylvania*, 97 U.S. 566, 573; *May v. New Orleans*, 178 U.S. 496, 501, 507-508; *Burke v. Wells*, 208 U.S. 14, 21-22, 24; *Gulf Fisheries Co. v. McInerney*, 276 U.S. 124, 126-127; *McGoldrick v. Gulf Oil Corp.*, 309 U.S. 414, 423.

324 U.S., at 657.

While it is true that *Hooven I* relied on language in *Brown v. Maryland*, 12 Wheat. 419 (1827), a review of *Low* and *Hooven I* reveals that both decisions relied on the same language of *Brown*. The following language from *Brown* was relied on by *Low* (13 Wall., at 33) and by *Hooven I* (324 U.S., at 657 and 665):

> [B]ut while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports, to escape the prohibition in the constitution.
>
> 12 Wheat., at 442.

Both *Low* (13 Wall., at 34) and *Hooven I* (324 U.S., at 666) also quoted and relied on the following language from *The License Cases*, 5 How. 504, 575 (1847):

> Indeed, goods imported, while they remain in the hands of the importer, in the form and shape in which they were brought into the country, can in no just sense be regarded as a part of that mass of property in the state usually taxed for the support of the state government.

Low and *Hooven I* both read the above language from *Brown* and *The License Cases* as prohibiting a tax in any form on imported goods held in their original package. Therefore, if *Low* had misread the opinions in *Brown* and *The License Cases*, as the *Michelin* Court expressly found

(423 U.S., at 282-283 and 299-301) so did *Hooven I*, and its holding based thereon is no more currently valid than the expressly overruled decision in *Low*.

However, in its decision below, the Ohio Supreme Court held that *Michelin* had neither implicitly overruled *Hooven I* nor altered the legal principles upon which that decision was based. The Court expressly found that *Hooven I* retained its vitality even subsequent to *Michelin* and, based on that finding, rejected the Tax Commissioner's argument based on *Commissioner v. Sunnen*, 333 U.S. 591 (1948), that *Michelin* eviscerated the collateral estoppel effect of *Hooven I*. The Ohio Supreme Court's reasoning in its attempt to distinguish *Michelin* and *Hooven I* reveals the Court's basic misunderstanding of this Court's decision in *Michelin*. The Ohio Supreme Court distinguished the two cases based on the factual distinctiveness of the goods involved and their status as imports and the language regarding *Hooven I* contained in this Court's decision in *Youngstown Sheet & Tube Co. v. Bowers*, and *United States Plywood Corp. v. Algoma*, 358 U.S. 534 (1959), a decision which was rendered prior to *Michelin* and which was based upon the "current operational needs" doctrine which was merely another test formalized to determine whether the goods at issue had lost their status as imports.

This attempt to distinguish *Michelin* because it involved imported goods held for resale is inconsistent with the holding in *Hooven I* that whether the imported goods were held for resale or for use in manufacturing was not relevant to a determination of their immunity from taxation under the Import-Export Clause. 324 U.S., at 667-668. The reasoning of the Ohio Supreme Court in its decision below is particularly curious when viewed from the perspective of the history of *Hooven I*. In its consideration of the applicability of the Import-Export Clause in *Hooven I* (142 Ohio St. 235, 51 N.E. 2d 723 (1943)), that

Court held that the "original package" rule applied only to imports held for resale and not to imported goods held for use in manufacturing and upheld the imposition of Ohio's ad valorem property tax on such goods.

This Court rejected this distinction, stating that "we see no practical reason for abandoning the test [original package] which has been applied for more than a century, or why, if we are to retain it in the case of imports for sale, we should reject it in the case of imports for manufacture." 324 U.S., at 668.

More importantly, the Ohio Supreme Court's attempt to distinguish the two cases ignores the fundamentally different approach to Import-Export Clause cases initiated by this Court in *Michelin*. Whether the goods had lost their status as imports was the specific inquiry abandoned by *Michelin*; the Court expressly refrained from addressing that question because the relevant inquiry was no longer the nature of the goods but the nature of the tax at issue. *Washington Revenue Dept. v. Association of Washington Stevedoring Cos.*, *supra*, at 752, 760.

Professor Walter Hellerstein, author of numerous articles concerning constitutional limitations on state taxation, also recognized the significance of *Michelin*:

> [B]ut its opinion in *Michelin* marks a fundamental reexamination of the purpose and scope of the import-export clause's prohibition against state taxation of imports. In contrast to its past decisions in this area, which were often characterized by a mechanistic application of Marshall's "original package" language in *Brown v. Maryland* to determine whether the goods under consideration had ceased to be "imports"[31] the Court's opinion explicitly refrained from addressing the question whether Michelin's tires had lost their status as imports. Rather, the court focused upon

the nature of the exaction at issue, to ascertain whether it constituted a forbidden "impost" or "duty."

[31] *See*, *e.g.*, *Hooven & Allison Co. v. Evatt*, 324 U.S. 652, 664-665 (1945).

W. Hellerstein, *State Taxation and the Supreme Court: Toward a More Unified Approach to Constitutional Adjudication?*, 75 Mich. L. Rev. 1426 at 1429-1430 (1977).

Under "the central holding of *Michelin* that the absolute ban is only of 'Imposts or Duties' and not of all taxes," *Washington Revenue Dept. v. Association of Washington Stevedoring Cos.*, *supra*, at 759, the relevant inquiry is whether the tax at issue constitutes a prohibited "Impost" or "Duty." If the challenged tax is determined not to be an "Impost" or "Duty," it will not offend the Import-Export Clause even if the goods have not lost their status as imports.

Therefore, *Hooven I* may properly be distinguished from *Michelin* only if the nature of the taxes at issue in the two cases differed. In *Michelin*, this Court held that a nondiscriminatory state ad valorem property tax was not an "Impost" or "Duty" and therefore was not barred by the Import-Export Clause. 423 U.S., at 283. In *Hooven I*, the Court held that a nondiscriminatory state ad valorem property tax could not be assessed against imported goods so long as those goods retained their status as imports. It cannot be disputed that the taxes at issue in *Michelin* and *Hooven I* were of the very same type. The only relevant distinction between the two cases is the fact that *Hooven I* invoked the "original package" doctrine of *Low v. Austin* in holding that Ohio could not levy its nondiscriminatory ad valorem property tax upon imported goods until they lost their status as imports and that this Court repudiated

the "original package" doctrine in *Michelin*. However, rather than supporting the Ohio Supreme Court's finding that *Hooven I* is of continued vitality, this distinction conclusively establishes that *Hooven I* retains no more validity than did the decision formalizing the "original package" doctrine, *Low v. Austin*, which was expressly overruled in *Michelin*.

The Ohio Supreme Court's holding below that petitioner was collaterally estopped by *Hooven I* from assessing Ohio's nondiscriminatory ad valorem personal property tax against respondent's imported raw materials held for use in manufacture necessarily adopted the legal principle upon which *Hooven I* was based, the "original package" doctrine. Because the opinion below resurrects the "original package" doctrine expressly repudiated in *Michelin*, it is in direct conflict with *Michelin*. This attempt to resurrect the "original package" doctrine after its burial in *Michelin* must be rejected, just as this Court rejected such an attempt in *Washington Revenue Dept. v. Association of Washington Stevedoring Cos.*, *supra*, at 760.

There is no logical or legal justification which would support a retention of the "original package" doctrine in cases involving imported manufacturing inventory while applying the fundamentally different analysis of *Michelin* in cases involving imported goods held for resale. The reasoning underlying *Michelin*'s abandoment of the "original package" doctrine is just as compelling with respect to imported manufacturing inventory as it is to imported goods held for resale. If a nondiscriminatory ad valorem property tax is not an "impost" or "duty," as *Michelin* specifically held, it is not within the strictures of the Import-Export Clause regardless of the type of imported goods upon which it is sought to be imposed.

Furthermore, to allow manufacturers who use imported raw materials to retain their immunity under the "original

package" doctrine and thus avoid contributing their share of the state's cost of providing its various services to all those within its borders would accord such manufacturers preferential treatment resulting in an unfair competitive advantage over manufacturers who use domestic raw materials. The *Michelin* Court held that the Import-Export Clause could not be read to allow such an unjust result:

> The Import-Export Clause clearly prohibits state taxation based on the foreign origin of the imported goods, but it cannot be read to accord imported goods preferential treatment that permits escape from uniform taxes imposed without regard to foreign origin for services which the State supplies.
>
> 423 U.S., at 287.

Simply stated, the Import-Export Clause prohibits state exactions discriminating against imports by reason of their origin, but it was not intended to provide a commercial advantage to those using imported goods by immunizing those goods from a state nondiscriminatory ad valorem property tax.

II *Michelin Tire Corp. v. Wages* Repudiated the Legal Principle upon Which *Hooven I* was Based, Thereby Rendering the Doctrine of Collateral Estoppel Inapplicable to the Tax Assessment at Issue.

In its decision holding that the Tax Commissioner of Ohio was collaterally estopped by *Hooven I* from assessing respondent's imported raw materials held for use in manufacture, the Ohio Supreme Court failed to properly apply this Court's decision in *Commissioner v. Sunnen*, 333 U.S. 591 (1948).

In *Sunnen*, this Court detailed at length the limitations on the applicability of the doctrine of collateral estoppel

in tax litigation and the rationale for such limitations.

But collateral estoppel is a doctrine capable of being applied so as to avoid an undue disparity in the impact of income tax liability. A taxpayer may secure a judicial determination of a particular tax matter, a matter which may recur without substantial variation for some years thereafter. But a subsequent modification of the significant facts or a change or development in the controlling legal principles may make that determination obsolete or erroneous, at least for future purposes. If such a determination is then perpetuated each succeeding year as to the taxpayer involved in the original litigation, he is accorded a tax treatment different from that given to other taxpayers of the same class. As a result, there are inequalities in the administration of the revenue laws, discriminatory distinctions in tax liability, and a fertile basis for litigious confusion. (citation omitted) Such consequences, however, are neither necessitated nor justified by the principle of collateral estoppel. That principle is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally. It is not meant to create vested rights in decisions that have become obsolete or erroneous with time, thereby causing inequities among taxpayers.

And so where two cases involve income taxes in different taxable years, collateral estoppel must be used with its limitations carefully in mind so as to avoid injustice. *It must be confined to situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged.*

333 U.S., at 599-600.
(Emphasis supplied)

The Court noted that a decision of this Court intervening between the two proceedings "may so change the legal atmosphere as to render the rule of collateral estoppel inapplicable." *Id.*, at 600.

The rationale for such a limitation on the application of collateral estoppel is obvious and compelling. The effect of applying the doctrine where there has been a change in the controlling legal principles would be to petrify the law as to taxpayers who won or lost on the basis of antiquated and rejected legal principles while the liability of taxpayers who had not sought legal redress would be determined on the basis of the current legal principles. *Id.*, at 599; *Montana v. United States*, 440 U.S. 147, 161 (1979); 1B *Moore's Federal Practice* § 0.422 at 3402, § 0.422[5] at 3451. Such disparate treatment of taxpayers in the same class would result in basic tax inequality, a result which cannot justly be allowed by blind reliance on the doctrine of collateral estoppel.

The limitation on the doctrine of collateral estoppel espoused in *Sunnen* is particularly applicable in this case. Although the opinion below does not clearly and definitively articulate the precise reason for not limiting the application of collateral estoppel[1], the effect of the deci-

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[1] As an example, while the Ohio Supreme Court apparently acknowledged that *Michelin* repudiated the "original package" doctrine, at n.1 of its Opinion (Pet. App. A-6), which indicates that it recognized that *Michelin* had changed the controlling legal principles in Import-Export Clause cases, its finding that *Hooven I* was of continued vitality subsequent to *Michelin* runs counter to that indication.

sion is clear. It will result in "inequalities in the administration of the revenue laws, discriminatory distinctions in tax liability, and a fertile basis for litigious confusion," the avoidance of which was the fundamental reason for the limitation on the doctrine of collateral estoppel enunciated in *Sunnen*, 333 U.S. at 599.

If left standing, the Ohio Supreme Court's decision barring the Tax Commissioner from assessing Ohio's nondiscriminatory ad valorem property tax against respondent's imported raw materials will result in respondent avoiding forever the tax on its imported raw materials inventory because of a prior decision, *Hooven I*, which was based on a now repudiated legal principle, the "original package" doctrine, while all other taxpayers would be subject to that tax on their imported raw materials inventory under the fundamentally different legal principles enunciated in *Michelin*[2]. Respondent alone would be perpetually immune from such taxation, while all other taxpayers would subsidize the services and benefits provided by Ohio to this one taxpayer. Respondent would be accorded a distinct competitive advantage over other manufacturers, a result directly contrary to the admonition in *Sunnen* that collateral estoppel is not to be blindly applied where, because of an intervening change in the controlling legal principles, to do so would cause tax inequality.

Because application of the doctrine of collateral estoppel based on *Hooven I* would result in a discriminatory application of the tax laws, the Ohio Supreme Court should have followed this Court's decision in *Sunnen* and held that

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[2] Petitioner's argument that *Michelin* changed the controlling legal principle upon which *Hooven I* was decided, the "original package" doctrine, is fully addressed in the immediately preceding part of this Brief.

Hooven I was no longer conclusive as a result of *Michelin's* repudiation of the "original package" doctrine, the legal principle upon which *Hooven I* was based.

CONCLUSION

For the reasons set forth in the foregoing brief, the judgment of the Supreme Court of Ohio should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Brief for the Petitioner have been served on the respondent by forwarding such copies to Michael A. Nims, Kenneth E. Updegraft, Jr., and Charles H. Mollenberg, Jr., Jones, Day, Reavis & Pogue, 1700 Union Commerce Building, Cleveland, Ohio 44115, counsel for respondent, by United States mail, postpaid, this 16th day of November, 1983. I further certify that all parties required to be served have been served.

RICHARD C. FARRIN
Assistant Attorney General

No. 83-96

IN THE

Supreme Court of the United States

October Term, 1983

JOANNE LIMBACH,
TAX COMMISSIONER OF OHIO,
Petitioner

v.

THE HOOVEN & ALLISON COMPANY,
Respondent

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF OHIO

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Supreme Court of Ohio correctly held under Ohio law that the Tax Commissioner of Ohio was collaterally estopped from assessing Ohio's ad valorem personal property tax against respondent Hooven & Allison Company's inventory of imported raw materials held for future use in manufacturing, on the basis of this Court's decision in *Hooven & Allison Co. v. Evatt*, 324 U.S. 652 (1945).

II. Whether this Court should decide the federal constitutional issues presented for review in the absence of a factual record and a decision by the court below on these issues.

III. Whether Ohio's assessment of its ad valorem personal property tax against respondent Hooven & Allison Company's inventory of imported raw materials held for future use in manufacturing violates the Foreign Commerce Clause or Import-Export Clause of the United States Constitution.

PARTIES

Respondent The Hooven and Allison Company changed its name in January, 1983 to H & A Industries, Inc. Respondent has one subsidiary, Bolen Leather Products, Inc.

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BRIEF FOR RESPONDENT

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions cited by petitioner, this case involves the Foreign Commerce Clause, which is contained within Article I, §8, cl. 3 of the United States Constitution. Article I, §8, cl. 3 of the United States Constitution provides, in pertinent part:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations and among the several States . . . .

STATEMENT OF THE CASE

Respondent The Hooven and Allison Company ("Hooven & Allison") is a manufacturer of cordage products made from natural fibers. These natural fibers are not grown in the United States and must be imported. This case concerns a personal property tax assessment issued by petitioner Tax Commissioner of Ohio on Hooven & Allison's inventory of imported raw materials held for future use in manufacturing cordage. The Tax Commissioner increased the assessed value of personal property for the tax years 1976 and 1977 by including as part of Hooven & Allison's taxable manufacturing inventory the average value of its imported raw materials inventory held for future use in manufacturing. In its tax returns, Hooven & Allison had deducted the value of such imported raw materials from its manufacturing inventory on the authority of this Court's decision in *Hooven & Allison Co. v. Evatt*, 324 U.S. 652 (1945) (hereinafter "*Hooven I*").[1]

Upon application for review, the Tax Commissioner sustained the increased assessments, disregarding Hooven & Allison's collateral estoppel and federal constitutional arguments. Pet. App. A-11. The Tax Commissioner relied on *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976) (hereinafter "*Michelin Tire*"), in which this Court held that the Import-Export Clause did not proscribe the imposition by the State of Georgia of a nondiscriminatory ad valorem personal property tax on imported finished goods sorted, arranged and held strictly for resale. Though the Tax Com-

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[1] In *Hooven I*, this Court held, on the same facts, that Hooven & Allison's imported raw materials stored in their original packages and held for future use in manufacturing were immune under the Import-Export Clause of the United States Constitution from Ohio's personal property tax.

missioner recognized that this Court had not overruled *Hooven I* in its *Michelin Tire* decision, the Tax Commissioner reasoned that the "rationale" of the *Michelin Tire* decision was "equally persuasive" in the context of Hooven & Allison's imported raw materials stored for later use in manufacturing. Pet. App. A-15.

Hooven & Allison appealed to the Ohio Board of Tax Appeals. Hooven & Allison raised again the collateral estoppel and federal constitutional issues presented here.[2] The Board of Tax Appeals adopted the essential facts, as stated in the Tax Commissioner's Certificate of Determination:

> The applicant is a manufacturer of cordage, importing certain quantities of raw materials (hemp, sisal, jute, manila, etc.) each year from Tanzania, Ecuador, Kenya, Thailand, Bangladesh, et al. Such imported manufacturing inventory is ordered on credit from foreign producers and shippers through their brokers in various U.S. coastal cities, who then arrange for its transport by ocean-going vessel to the United States. Upon arrival in this country, the imports are transported overland by rail to the applicant's Xenia plant. At the Xenia plant, the bales of raw materials are placed in a warehouse and inspected, with payment then being made to the broker by pro forma invoice; any weight variations or quality grade differences discovered upon inspection result in a claim for partial refund. (However, whether the materials are subsequently approved as inspected or a claim for damage or misgrading is filed, Hooven & Allison takes title to all the bales of materials when they are boarded

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[2] Decision and Order of Board of Tax Appeals, entered March 19, 1982. Pet. App. A-10.

> overseas on the ocean-going vessels.)[3] After complete tagging and inspection, the imported bales of raw materials are then stored in a dry area in their original packages until placed into production.

Pet. App. at A-11, A-12.

Upon the record and briefs submitted by the parties, the Board of Tax Appeals held:

> The evidence before the Board of Tax Appeals establishes that the parties involved in this matter are identical to those involved in *Hooven 1*. The taxability of raw materials issue involved in the case at bar was also an issue in *Hooven 1*. The raw materials and the type of taxation involved in this cause are identical to those involved in *Hooven 1*. *Hooven 1* has not been reversed by the U.S. Supreme Court and thus, has the force and effect of law. Under the doctrine of collateral estoppel, litigation of the instant [taxability of the involved raw materials] [sic] issue is barred in this matter and the exemption from taxation was improperly held to be unavailable.

The Board of Tax Appeals rejected the Tax Commissioner's argument that this Court in *Michelin Tire* had overruled *Hooven 1*. Accordingly, the Board of Tax Appeals reversed the Tax Commissioner.

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[3] Due to a misunderstanding, representatives of Hooven & Allison advised the Tax Commissioner erroneously that Hooven & Allison took title to the imported fibers at the time they were boarded on vessels in foreign ports. In fact, Hooven & Allison's contracts for the purchase of fibers provided, as did the contracts considered by this Court in *Hooven 1*, that title passed to Hooven & Allison upon payment of the purchase price. Hooven & Allison informed the Board of Tax Appeals of this factual error in its brief at page ten, but apparently the Board of Tax Appeals overlooked the correction. In any event, this factual error is inconsequential. This Court stated in *Hooven 1* that "the time when title passes to [Hooven & Allison] is immaterial to decision." 324 U.S. at 662 n.3.

The Board of Tax Appeals decided only the collateral estoppel issue. Because the Tax Commissioner took the position that this Court in *Michelin Tire* had overruled *Hooven I*, the Tax Commissioner deliberately chose to present no evidence regarding the constitutional issues. Furthermore, as the Tax Commissioner also contended before the Board of Tax Appeals, the Board of Tax Appeals lacked jurisdiction under Ohio law to consider the federal constitutional issues. *S. S. Kresge Co. v. Bowers*, 170 Ohio St. 405, 407, 166 N.E.2d 139, 141 (1960), *appeal dism'd*, 365 U.S. 466 (1961). Therefore, Hooven & Allison also did not present, and was not required to present, any evidence concerning the constitutional issues to the Board of Tax Appeals.

Hooven & Allison filed a Notice of Appeal to the Supreme Court of Ohio in order to raise the constitutional issues, which the Board of Tax Appeals could not consider, and to preserve its right to have the Supreme Court of Ohio consider alternative grounds for affirming the Decision and Order of the Board of Tax Appeals. *Rowland v. Collins*, 48 Ohio St.2d 311, 312, 358 N.E.2d 582 (1976).

The Tax Commissioner of Ohio filed subsequently a Notice of Cross-Appeal to the Supreme Court of Ohio. The Tax Commissioner's Notice of Cross-Appeal raised only a question of state law—whether the Board of Tax Appeals had correctly applied the state law principles of collateral estoppel:

> The Board erred in holding that the Tax Commissioner is collaterally estopped by the decision of the United States Supreme Court in *Hooven and Allison Co. v. Evatt*, 324 U.S. 652 (1945), from assessing the personal property tax for tax years 1976 and 1977 on taxpayer's imported raw materials inventory retained in its original packages on tax listing day and, based on such holding, deciding that the final determinations of the Tax Commissioner in issue in BTA Case Nos. 79-C-637 and 79-C-638 should be reversed.

As before the Board of Tax Appeals, the Tax Commissioner again chose not to present any evidence relating to the federal constitutional questions raised in Hooven & Allison's appeal, though those questions arose within the original jurisdiction of the Ohio Supreme Court. Hooven & Allison sought to invoke the original jurisdiction of the court and, pursuant to Ohio Supreme Court Rule VIII, §7, presented certain facts pertaining to the constitutional issues by means of an affidavit of John P. Buck, its Vice President and Treasurer.[4] It further requested an evidentiary hearing, if the Ohio Supreme Court preferred to ascertain the facts through a factual hearing. Reply Brief of Appellant and Cross-Appellee, at 11. Because the Ohio Supreme Court did not reach the federal constitutional issues raised only in Hooven & Allison's appeal, the court did not undertake any fact-finding and did not request the parties to develop a factual record on those issues.

The Ohio Supreme Court affirmed the Board of Tax Appeals. The court held that under Ohio law the principles of collateral estoppel prohibited the Tax Commissioner from assessing Ohio's personal property tax against Hooven & Allison's imported raw materials held for future use in manufacturing. It carefully considered the effect of this Court's decision in *Michelin Tire*. It found that this Court had not overruled *Hooven I* in *Michelin Tire*. Though this Court had discussed *Hooven I* in *Michelin Tire*, this Court explicitly overruled only *Low v. Austin*, 80 U.S. (13 Wall.) 29 (1872). Therefore, the Ohio Supreme Court held that this "[C]ourt's action—or inaction— must be accorded conclusive effect, at least in regard to its intent in reapprais-

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[4] Counsel for the Tax Commissioner refused to include the Affidavit of John P. Buck in the Joint Appendix. Despite respondent's designation of this affidavit, counsel for the Tax Commissioner improperly arrogated to himself the judicial power to determine that this affidavit was not a part of the record below. This affidavit is therefore included as Appendix A to this brief.

ing its earlier ruling in *Hooven I*." 4 Ohio St.3d at 172; 447 N.E.2d at 1298; Pet. App. at A-6.

Contrary to the Tax Commissioner's unjustified claim that the Ohio Supreme Court resurrected the original package doctrine buried in *Michelin Tire*, the court recognized that *Michelin Tire* sounded the "death knell" of the original package doctrine. *Id.* But, it found ample distinguishing facts between the imported finished goods held for resale in *Michelin Tire* and the imported raw materials held for future use in manufacturing in *Hooven I* (and this case). *Id.* This distinction was found to be particularly significant because this Court reserved judgment in *Michelin Tire* on the constitutionality of the state personal property tax imposed on imported tubes, which are more akin to the imported raw materials of Hooven & Allison than Michelin Tire's finished tires held for resale. *Id.*; Pet. App. at A-7. Noting that this Court, since *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827), has disdained "an inflexible rule" regarding the constitutionality of state taxation of foreign commerce, the Ohio Supreme Court aptly reasoned:

> Finally, it has been suggested that we ignore the dictates of *Hooven I* as *Michelin* indicates at the very least the United States Supreme Court's intention presently to abandon the principles embodied in the former action. Were this court to comply with such a request, we would be guilty of overreaching.

4 Ohio St.3d at 173; 447 N.E.2d at 1299; Pet. App. at A-9.

Therefore, on the basis of distinguishing characteristics between the possible effect of state taxation on foreign commerce in *Hooven I* (and this case) in contrast to *Michelin Tire*, the Ohio Supreme Court rejected the Tax Commissioner's argument of the implicit overruling of *Hooven I* and held under Ohio law that collateral estoppel applied to bar state taxation of Hooven & Allison's imported raw materials. Accordingly, it did not address the federal

constitutional issues raised solely by Hooven & Allison, not by the Tax Commissioner, in its appeal. The Ohio Supreme Court decided only the issue of collateral estoppel under applicable principles of state law.

SUMMARY OF ARGUMENT

1. Before the Supreme Court of Ohio, the Tax Commissioner deliberately chose to argue only that *Michelin Tire* overruled *Hooven I* as a matter of law. Consistent with this conscious strategy, the Tax Commissioner chose not to present any factual evidence concerning whether *Hooven I* had been overruled or should be overruled on the authority of *Michelin Tire*. Consequently, the Tax Commissioner raised below only a narrow issue of law. The Supreme Court of Ohio correctly decided this issue of law by holding that this Court in *Michelin Tire* had not overruled *Hooven I*. Though this Court discussed *Hooven I* in *Michelin Tire*, it overruled only *Low v. Austin*, 80 U.S. (13 Wall.) 29 (1872). The different factual context of *Hooven I* from *Michelin Tire* provided good reason for the *Michelin Tire* Court not to decide whether to overrule *Hooven I* before examining the practical effect on foreign commerce of Ohio's personal property tax as applied to Hooven & Allison's inventory of imported raw materials held for future use in manufacturing. Because the Tax Commissioner presented no factual evidence, once the Ohio Supreme Court correctly held that *Michelin Tire* had not overruled *Hooven I* as a matter of law, it indisputably followed that state law principles of collateral estoppel barred state personal property taxation of Hooven & Allison's raw materials inventory.

2. This Court should dismiss its writ of certiorari as improvidently granted. The Tax Commissioner failed to develop any factual record below concerning the federal constitutional questions. This Court, therefore, lacks an

adequate factual record on which to consider the practical effect of the state personal property tax on foreign commerce as applied to Hooven & Allison's importation of raw materials. Without a factual record, this Court should not decide the important federal constitutional issues. The remaining collateral estoppel issue raises primarily a question of state law and therefore does not warrant review by writ of certiorari.

3. Ohio personal property taxation of Hooven & Allison's imported raw materials inventory would violate the Foreign Commerce Clause and the policies underlying the Import-Export Clause, by subjecting Hooven & Allison to unduly burdensome multiple taxation solely because of the foreign origin of its raw materials, by interfering with national foreign policy on international trade, and by likely causing interstate commercial conflict.

ARGUMENT

I. THIS COURT IN MICHELIN TIRE DID NOT OVERRULE HOOVEN I. THEREFORE, THE SUPREME COURT OF OHIO CORRECTLY APPLIED STATE LAW PRINCIPLES OF COLLATERAL ESTOPPEL TO BAR THE TAX COMMISSIONER FROM ASSESSING THE STATE PERSONAL PROPERTY TAX AGAINST HOOVEN & ALLISON'S INVENTORY OF IMPORTED RAW MATERIALS HELD FOR FUTURE USE IN MANUFACTURING.

The Tax Commissioner took the position below that this Court's opinion in *Michelin Tire* had the effect *as a matter of law* of overruling *Hooven I*. Consequently, the Tax Commissioner deliberately chose not to establish a factual record that would show why *Hooven I* should either be held to have been overruled in *Michelin Tire* or should now be overruled. The conscious decision of the Tax Commissioner to choose as his battleground the one argument

that *Michelin Tire* had overruled *Hooven I* and that facts were not necessary to this determination left the Supreme Court of Ohio with a very narrow issue — whether this Court had overruled *Hooven I* as a matter of law. Plainly this Court in *Michelin Tire* did not intend to overrule *Hooven I*. Once the Supreme Court of Ohio decided this issue, as it did correctly, its application of state law collateral estoppel principles followed as a matter of course.

This Court held in *Hooven I* that the Import-Export Clause prohibited the State of Ohio from assessing its personal property tax against Hooven & Allison's inventory of imported raw materials held for future use in manufacturing. It is undisputed that the facts surrounding Hooven & Allison's purchase, importation, storage and use of the raw materials, on which the Tax Commissioner assessed personal property taxes in tax years 1976 and 1977, were identical in every material respect to the facts which this Court considered in its 1945 opinion. Further, the present litigation involved the same parties and raised the same legal issues below as in *Hooven I*. Therefore, the Supreme Court of Ohio properly applied the principles of collateral estoppel under Ohio law to prohibit the Tax Commissioner from relitigating against Hooven & Allison the precise issues which this Court had previously decided in favor of Hooven & Allison. *City of Columbus v. Union Cemetery Ass'n*, 45 Ohio St.2d 47, 341 N.E.2d 298 (1976) (Syllabus 1), approving and following *Whitehead v. General Telephone Co.*, 20 Ohio St.2d 108, 254 N.E.2d 10 (1969) and *Norwood v. McDonald*, 142 Ohio St. 299, 52 N.E.2d 67 (1943).

The Tax Commissioner has argued, relying on *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591 (1948), that a change in the legal atmosphere since *Hooven I* makes collateral estoppel inappropriate. However, because *Sunnen* is a federal decision concerning federal taxation, it is not controlling on the Ohio Supreme Court's application of collateral estoppel principles.

Moreover, the Tax Commissioner has read *Sunnen* much too broadly. The decision in *Sunnen* stands for the accepted proposition that collateral estoppel does not operate in the event of a major change in the controlling facts or a reversal in the applicable legal principles. *Id.* at 599. *Sunnen* does not hold, as the Tax Commissioner has contended, that every change in the legal atmosphere surrounding a prior decision of this Court empowers an inferior tribunal to ignore the collateral estoppel effect of that decision.

Collateral estoppel must apply unless this Court has overruled its prior decision. As this Court stated in *Montana v. United States*, 440 U.S. 147, 161 (1979), "unless there have been major changes in the law governing intergovernmental tax immunity since *Kiewit I*, the Government's reliance on *Commissioner v. Sunnen*, 333 U.S. 591 (1948), is misplaced." This Court concluded in *Montana v. United States:* "Because the factual and legal context in which the issues of this case arise has not materially altered since *Kiewit I*, normal rules of preclusion should operate to relieve the parties of 'redundant litigation [over] the identical question of the statute's application to the taxpayer's status.' *Tait v. Western Maryland R. Co.*, 289 U.S. 620, 624 (1933)." 440 U.S. at 162. The principles of collateral estoppel, therefore, are applicable to this case, because neither a major change in the controlling facts nor a reversal of legal principles has occurred.

No relevant change in the controlling legal principles and facts has occurred since *Hooven I* was decided. The controlling facts in this case are indisputably identical to the facts in *Hooven I*. Likewise, the controlling principles of law have not been reversed. This Court did not overrule in *Michelin Tire* its prior decision in *Hooven I*. Though explicitly referring to *Hooven I* in its opinion in *Michelin Tire*, this Court overruled only *Low v. Austin*, 80 U.S. (13 Wall.) 29 (1872). 423 U.S. at 301. The Tax Commissioner has conceded, therefore, as she must, that this Court has not expressly overruled *Hooven I*. Brief for the Petitioner, at 16.

Further, the controlling facts in *Hooven I* (and this case) are distinguishable from the facts in *Michelin Tire*. The Ohio tax in *Hooven I* was imposed on imported raw materials held for later use in manufacturing. The Georgia tax in *Michelin Tire* fell on imported finished goods arranged and held strictly for resale. *Michelin Tire* did not address the constitutionality of state taxation of imported raw materials inventories and did not consider the fundamental economic differences between taxation of finished goods held for resale and raw materials stored for future manufacturing use. This Court in *Michelin Tire* explicitly declined to decide the constitutionality of the Georgia tax as applied to imported tubes. 423 U.S. at 279. Before the decision in *Michelin Tire* could be found to have caused a change in the legal atmosphere sufficient to nullify the collateral estoppel effect of *Hooven I*, the Tax Commissioner was required to demonstrate that *Michelin Tire* involved facts "materially the same" as the facts in *Hooven I*. *See Hercules Powder Co. v. United States*, 337 F.2d 643, 646 (Ct. Cl. 1964). Because the facts in *Hooven I* are not materially the same as the facts involved in *Michelin Tire*, no change in the controlling facts or law has occurred since *Hooven I*.

The fact that this Court in *Michelin Tire* referred expressly to *Hooven I*, but did not overrule it, forecloses the Tax Commissioner's argument that *Hooven I* was overruled by implication.[5] The only plausible conclusion is that this Court decided deliberately not to overrule *Hooven I*. This conclusion is strengthened by the fact that *Hooven I* is the only decision of this Court to address directly the constitutionality of state personal property taxation on imported raw materials held for future use in manufacturing.

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[5] This fact also demonstrates the lack of merit to the Tax Commissioner's argument that this Court is ordinarily unable to give a complete listing of every prior case which a new decision has the effect of overruling. In this case, the Court was well aware of *Hooven I* and chose not to overrule it.

The Tax Commissioner has argued that *Hooven I* has been overruled because it is premised on the reasoning of *Low v. Austin*, which this Court overruled in *Michelin Tire*. This argument is both mistaken and immaterial. The decision of this Court in *Hooven I* was not based on *Low v. Austin*. In fact, the majority opinion in *Hooven I* mentioned *Low v. Austin* only twice,[6] and never relied on *Low v. Austin* as authority for its decision. This Court noted that *Hooven I* was decided "[i]n another context" from *Low v. Austin*. 423 U.S. at 301 n.13.

Instead of *Low v. Austin*, the decision in *Hooven I* is grounded firmly in the opinion of Chief Justice John Marshall in *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827), which relied on the Foreign Commerce Clause in addition to the Import-Export Clause to strike down a state tax. Like *Hooven I*, *Brown v. Maryland* was not overruled in *Michelin Tire*. The Court recognized in *Hooven I* that state personal property taxation could also violate the Foreign Commerce Clause, whether or not the imported raw materials were retained in their original packages. 324 U.S. at 665-66. Thus, the original package doctrine is not the only basis on which the result in *Hooven I* can now be sustained, contrary to the Tax Commissioner's contention. In any event, the Tax Commissioner's argument is simply immaterial for the reason that this Court chose deliberately in *Michelin Tire* not to overrule *Hooven I*, and only to overrule *Low v. Austin*.

The Tax Commissioner has also argued incorrectly that the new mode of analysis adopted in *Michelin Tire* has the consequence of overruling *Hooven*. Again, this contention is mistaken for the reason that this Court did not apply the reasoning of *Michelin Tire* to the different context found in *Hooven I*. Furthermore, this Court has made clear in determining the constitutionality of state taxation under the Commerce Clause that its disapproval of the method of

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[6] *See* 324 U.S. at 657, 666.

analysis of a prior decision does not mandate overruling the result of that decision without further consideration. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 617 (1981). This Court has emphasized its need to have the benefit of a complete factual record and full argument before considering any overruling of a prior case. *Department of Revenue of Washington v. Ass'n of Washington Stevedoring Cos.*, 435 U.S. 734, 757 (1978).

This judicious restraint is particularly warranted in considering the constitutionality of state taxation, because this Court has consistently followed a pragmatic approach to applying the Import-Export and Foreign Commerce Clauses, as demonstrated in both *Hooven I and Michelin Tire*.[7] 423 U.S. at 285-89; 324 U.S. at 668. It reached different conclusions in these cases based on the divergent impact of the taxes. This Court was well aware in *Hooven I* of "the exclusive power of the national government to tax imports," "the burden of unequal local taxation by the seaboard, at the expense of the interior states," and "the national concern in protecting national commercial relations" — factors all utilized in *Michelin Tire*. 324 U.S. at 656, 664, 678. The thoroughness of Mr. Justice Black's analysis of these concerns in

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[7] More recently the Court has said:

> On various occasions when called upon to make the delicate adjustment between the national interest in free and open trade and the legitimate interest of the individual States in exercising their taxing powers, the Court has counseled that the result turns on the unique characteristics of the statute at issue and the particular circumstances in each case.

Boston Stock Exchange v. State Tax Commission, 429 U.S. 318, 329 (1977). Since *Michelin Tire*, the Court has struck down under the Commerce Clause a state transfer tax on interstate securities transactions, *Boston Stock Exchange*, *supra*, and a state ad valorem property tax on foreign-owned containers used exclusively in international commerce, *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979). In each case the Court's decision turned on the specific tax at issue and the specific context in which it was levied.

his dissent in *Hooven I* demonstrates the depth of consideration which the Court gave these factors. The impact of Ohio's personal property tax on Hooven & Allison's raw materials inventory rendered the tax unconstitutional. In contrast, the impact of the state tax in *Michelin Tire* passed the Court's scrutiny.

Michelin Tire did not hold that all forms of facially nondiscriminatory state personal property taxation are permitted. In *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979), this Court struck down a state nondiscriminatory ad valorem personal property tax as applied. Consequently, the constitutionality of state personal property taxation, even if facially neutral, must be evaluated in a specific factual context. Therefore, the Ohio Supreme Court was entirely correct in holding that *Michelin Tire* had not overruled *Hooven I* as a matter of law and that, accordingly, the Tax Commissioner was collaterally estopped from taxing Hooven & Allison's imported raw materials. In the absence of a factual record, it could properly reach no other result.

II. THIS COURT LACKS AN ADEQUATE FACTUAL RECORD TO DECIDE THE FEDERAL CONSTITUTIONAL ISSUES AND SHOULD DISMISS ITS WRIT OF CERTIORARI AS IMPROVIDENTLY GRANTED.

Resolution of the important federal constitutional issues in this case requires consideration of the practical effect of Ohio's personal property tax on foreign commerce. This Court concluded in *Hooven I*: "As was emphasized in *Brown v. Maryland, supra*, the reconciliation of the competing demands of the constitutional immunity and of the state's power to tax, is an extremely practical matter." 324 U.S. at 668.[5]

> A state tax must be assessed in light of its actual effect considered in conjunction with other provisions of the

[5] *See also* pages 20-21, 27-31 *infra*.

> State's tax scheme. "In each case it is *our duty* to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce." *Best & Co. v. Maxwell*, 311 U.S. 454, 455-56 (1940).

Maryland v. Louisiana, 451 U.S. 725, 756 (1981) (emphasis added).

This practical effect cannot be determined by a superficial look at the face of the taxing statute, as the Tax Commissioner contends. However, except for the affidavit of John P. Buck, the record is barren of any facts relating to the federal constitutional issues. The record is empty because the Tax Commissioner has taken the position throughout this litigation that *Michelin Tire* had overruled *Hooven I* and because the Tax Commissioner further contended that the Ohio Board of Tax Appeals lacked jurisdiction to consider the federal constitutional issues. The Tax Commissioner has even contended before this Court that the affidavit of John P. Buck is not a part of the record.

Because the Ohio Board of Tax Appeals decided only the collateral estoppel issue, the Tax Commissioner presented only this state law question in its appeal to the Ohio Supreme Court. Since the Ohio Supreme Court affirmed the Board of Tax Appeals on the basis of collateral estoppel, it did not address the federal constitutional issues and had no need to exercise its original jurisdiction over these issues to hear evidence and to make findings of fact. Consequently, through no fault of Hooven & Allison, the record is devoid of the facts necessary to resolve the federal constitutional issues.

This Court should not, and indeed cannot consistently with its prior case law, decide this case in the absence of a factual record. Therefore, on the basis of its judicious practice of not deciding important constitutional questions in

cases in which "the facts necessary for evaluation of the dispositive constitutional issues . . . are not adequately presented by the record," this Court should dismiss its writ of certiorari as improvidently granted. *Wainwright v. City of New Orleans*, 392 U.S. 598, 599 (1968) (per curiam) (Fortas, J., concurring). *See also Johnson v. Massachusetts*, 390 U.S. 511 (1968) (per curiam); *Mitchell v. Oregon Frozen Foods Co.*, 361 U.S. 231 (1960) (per curiam).

Furthermore, the remaining collateral estoppel issue raises primarily a question of state law. The Ohio Supreme Court's application of collateral estoppel as a matter of state law was indisputably proper, once it had correctly determined that the *Michelin Tire* Court had not overruled *Hooven I*. Because the court below decided only the issue of state law raised by the Tax Commissioner and expressly declined to decide the federal constitutional issues raised by Hooven & Allison, no federal constitutional questions are properly before this Court. It is indeed anomalous that the Tax Commissioner has sought to have this Court decide federal constitutional issues which she did not raise below and which the Ohio Supreme Court did not address because of its decision based on the primarily state law issue of collateral estoppel. Whether or not the Ohio Supreme Court correctly decided the collateral estoppel issue does not present a federal constitutional issue and does not raise an issue of such importance as to merit this Court's review by writ of certiorari. For this reason, too, the writ of certiorari should be dismissed as improvidently granted. *Wolf v. Weinstein*, 372 U.S. 633 (1963).

III. THE IMPOSITION OF THE OHIO PERSONAL PROPERTY TAX ON HOOVEN & ALLISON'S INVENTORY OF IMPORTED RAW MATERIALS HELD FOR FUTURE USE IN MANUFACTURING VIOLATES THE FOREIGN COMMERCE CLAUSE AND IMPORT-EXPORT CLAUSE.

The Tax Commissioner has not advanced any arguments of fact to support her contention that Ohio may constitutionally assess its personal property tax against Hooven & Allison's imported fibers inventory. Instead, consistent with her deliberate litigation strategy below, the Tax Commissioner has cavalierly dismissed the need for any factual analysis by making the bald and unsupported claim that "[t]here is no logical or legal justification which would support a retention of the 'original package' doctrine in cases involving imported manufacturing inventory while applying the fundamentally different analysis of *Michelin* in cases involving imported goods held for resale." Brief for Petitioner, at 21. Though the only issue properly before this Court is whether the Supreme Court of Ohio correctly determined the issue of collateral estoppel, it is important for the resolution of that issue that the need for a factual record on which to decide the constitutional issues is clear. Accordingly, the factual framework, which demonstrates the unconstitutionality of the state personal property tax in this case and the error of the Tax Commissioner's argument, is set forth below.

The Tax Commissioner's argument is premised on several fundamental misconceptions. The Tax Commissioner has contended that this Court should examine only the label of the tax at issue in this case and that because this case involves an ad valorem personal property tax as in *Michelin Tire*, this Court should hold without further analysis that the Ohio tax automatically satisfies the Import-Export Clause. The Tax Commissioner would have this

Court simply substitute the magical litany of "nondiscriminatory ad valorem personal property tax" in place of "original package." The Tax Commissioner's argument invites the Court to undertake the same kind of formalistic, mechanical analysis which this Court has condemned in its recent state taxation decisions. *E.g.*, *Arkansas Electric Cooperative Corp. v. Arkansas Rubber Comm'n*, 103 S.Ct. 1905, 1916 (1983); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 443 (1979); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

In so arguing, the Tax Commissioner has completely ignored the Foreign Commerce Clause,[9] as well as the policies underlying the Import-Export Clause, as enunciated in *Michelin Tire*. Hooven & Allison is definitely not attempting to resurrect the "original package" doctrine, as the Tax Commissioner has claimed. Rather, Hooven & Allison is contending that the cumulative tax burden resulting from the assessment of the Ohio personal property tax contravenes the Foreign Commerce Clause and Import-Export Clause. In *Japan Line, Ltd., supra*, this Court struck down a state nondiscriminatory ad valorem personal property tax as violating the Foreign Commerce Clause. Thus, the Tax Commissioner has improperly asked this Court to engage in hasty overgeneralization by deciding this case without consideration of the practical effect of the Ohio personal property tax on foreign commerce as applied to Hooven & Allison's

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[9] This Court has recently acknowledged the different inquiry required by the Foreign Commerce Clause from the Import-Export Clause. *Department of Revenue of Washington v. Ass'n of Washington Stevedoring Cos.*, 435 U.S. 734, 751 (1978). Therefore, a state personal property tax may satisfy the Import-Export Clause, but run afoul of the Foreign Commerce Clause. *Compare Michelin Tire with Japan Line Ltd., supra*.

inventory of imported raw materials held for future use in manufacturing.

Examination of the practical effect of the state taxation will demonstrate that Hooven & Allison is not seeking preferential tax treatment, as the Tax Commissioner has myopically contended; instead, it is seeking to survive as an American company by removing the undue burden of multiple taxation. Contrary to the Tax Commissioner's contention, Hooven & Allison is not asking this Court to grant it a competitive advantage over manufacturers using domestically produced raw materials. Nor would tax immunity in this case cause manufacturers to switch from domestically produced fibers to foreign grown fibers. As the Tax Commissioner well knows, Hooven & Allison's raw materials, consisting of natural fibers, such as jute, sisal, henequen, and manila, are not produced domestically. Its raw materials must be imported. Therefore, its choice is whether to keep its manufacturing facilities in the United States or instead to surrender to the Third World economic pressures to locate its manufacturing plant overseas.

Examination of the facts shows that state personal property taxation of Hooven & Allison's inventories of imported raw materials violates the Foreign Commerce and Import-Export Clauses of the United States Constitution on three grounds. First, it would subject Hooven & Allison to international multiple taxation.[10] Second, it would interfere with federal regulation of foreign commerce and it could reduce federal tariff revenues significantly. Third, it is likely to provoke interstate commercial conflict. In taking a pragmatic and case-specific approach to these constitutional provisions, this Court has found that the Import-Export and

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[10] This possibility was not considered by this Court in *Michelin Tire*, but has been a major factor in subsequent decisions. *E.g.*, *Japan Line, Ltd.*, 441 U.S. at 446.

Foreign Commerce Clauses reflect these overlapping concerns. *Japan Line, Ltd.*, 441 U.S. at 446-50.

A. Ohio Personal Property Taxation Of Hooven & Allison's Inventories Of Imported Fibers Would Subject Those Fibers To International Multiple Taxation.

State property taxation of Hooven & Allison's imported raw materials would burden those raw materials with double taxation in violation of the Foreign Commerce Clause. When goods of foreign origin which move in foreign commerce are taxed by several jurisdictions, the resulting cumulative tax burden discriminates against such commerce. State taxation which results in double taxation "in its practical operation discriminates against interstate commerce, since it imposes upon it, merely because interstate commerce is being done, the risk of a multiple tax burden to which local commerce is not exposed." *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434, 439 (1939). It could, indeed, "spell the destruction of interstate commerce and renew the barriers to interstate trade which it was the object of the commerce clause to remove." *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 256 (1938). Accordingly, it is a "commonplace of constitutional jurisprudence" that multiple taxation of foreign commerce, like interstate commerce, is constitutionally prohibited. *Japan Line, Ltd.*, 441 U.S. at 446.

In the case of foreign commerce, the mere risk of international multiple taxation makes a state tax constitutionally suspect. *Japan Line, Ltd.*, 441 U.S. at 448, 451. *See Developments in the Law — Federal Limitations on State Taxation of Interstate Business*, 75 HARV. L. REV. 953, 965-68 (1962). This strict standard is necessary because the extent of a foreign tax burden may be disguised and therefore difficult to document. Foreign taxes may not be denominated as such, or may actually be concealed for commercial or political reasons. A state-run enterprise can easily conceal an ex-

port tax in its export price. Or, a change in the exchange rate may have the same effect as an export tax.

Moreover, a merchant in foreign commerce, unlike his counterpart in interstate commerce, does not have the judicial remedy of apportionment for multiple taxation. He cannot come to this Court to force several taxing jurisdictions to apportion their respective tax burdens, and thus avoid multiple taxation. "[N]either this Court nor this Nation can ensure full apportionment when one of the taxing entities is a foreign sovereign." *Japan Line, Ltd.*, 441 U.S. at 447.

Therefore, this Court has held that, "[w]hen construing Congress' power to 'regulate Commerce with foreign Nations,' a more extensive constitutional inquiry is required." *Id.* at 446. "This case concerns foreign commerce. Even a slight overlapping of tax — a problem that might be deemed *de minimis* in a domestic context — assumes importance when sensitive matters of foreign relations and national sovereignty are concerned." *Id.* at 456. Accordingly, this Court has set forth a stringent test of constitutionality under the Foreign Commerce Clause:

> In addition to answering the nexus, apportionment, and nondiscrimination questions posed in *Complete Auto*, a court must also inquire, first, whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation, and, second, whether the tax prevents the Federal Government from "speaking with one voice when regulating commercial relations with foreign governments." If a state tax contravenes either of these precepts, it is unconstitutional under the Commerce Clause.

Japan Line, Ltd., 441 U.S. at 451.

Ohio's personal property tax subjects Hooven & Allison not just to the risk of multiple taxation, but to multiple taxation in fact. Some of Hooven & Allison's imported fibers are taxed abroad by the exporting countries because they are destined for export. The foreign suppliers from which

Hooven & Allison purchases raw fibers and assemblages of fibers include firms which are state-owned, state-controlled, or subject to state regulation as to quantity of output, price, or ownership. Affidavit of John P. Buck, ¶4[11]; *Latin America Commodities Report*, March 18, 1977, at 42. In a number of instances, Hooven & Allison has paid and continues to pay these suppliers, per pound of fibers, prices which actually are greater than the prevailing prices that those suppliers charge their export customers, per pound, for the rope that these suppliers manufacture from such fibers. Affidavit of John P. Buck, at ¶7. In other instances, state-owned suppliers from which Hooven & Allison has purchased fibers are offering fibers for sale at prices which are only slightly lower than the prices which they charge export customers for rope. *Id.* at ¶¶5-6. This small price differential is far less than the $.28 per pound that it costs Hooven & Allison to manufacture rope from these fibers. *Id.* at ¶ 5.

Obviously these foreign suppliers are charging Hooven & Allison a price for fibers far higher than the price that they charge for fibers consumed in domestic manufacturing. Such price discrimination, when practiced by a state enterprise, or by a firm subject to state regulation of its export prices, is the functional equivalent of an export tax.

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[11] This Court should consider the facts stated in the appended affidavit of John P. Buck, which was presented to the Ohio Supreme Court. The constitutionality of Ohio personal property taxation of Hooven & Allison's inventories of imported raw materials was an issue which arose originally before the Ohio Supreme Court. "[T]he Board of Tax Appeals, being an administrative agency and not a court, was without jurisdiction to consider and determine a question of constitutional validity." *S. S. Kresge Co. v. Bowers*, 170 Ohio St. at 407, 166 N.E. 2d at 141. Because the constitutional issue was raised pursuant to the original jurisdiction of that Court, Hooven & Allison was permitted to present additional facts related to the constitutional issues in order to facilitate the court's consideration of these issues. Ohio Sup. Ct. Rule VIII, §7 (set forth in Appendix B). Moreover, even if Mr. Buck's affidavit is not considered to be a part of the record, it shows the kinds of facts which must be in the record before this Court can meaningfully address the constitutional issues.

It is an export tax, moreover, that is designed to place foreign manufacturers, like Hooven & Allison, at a competitive disadvantage in relation to native industry. Developing nations frequently employ discriminatory taxation as an aid or incentive to capital formation. *See, e.g.*, Ross, *Foreign Governments' Tax Incentives for Investment*, in *Proceedings of the 1959 Institute on Private Investments Abroad*, at 285-336. Price discrimination against export customers for raw materials, in part accomplished through export tax incentives granted for exported manufactured goods, but not for exported raw materials, has been documented in the case of countries from which Hooven & Allison must purchase fibers. United Nations Food and Agriculture Organization, *Review of Oilseeds, Oils and Oilmeals Policies: Brazil* (January, 1982), at 6; Price, Waterhouse & Co., *Information Guide: Doing Business In Mexico* (1981), at 37; Price, Waterhouse & Co., *Information Guide: Doing Business in Brazil* (1980), at 18, 88-89; The World Bank, *Brazil: A Review of Agricultural Policies* (1982), at 78. *See* Manners, *The Changing World Market for Iron Ore* (1971), at 265.

Such price discrimination exists in the case of the fibers imported by Hooven & Allison. Brazil and Mexico, two primary suppliers of sisal fibers of the type imported by Hooven & Allison, together control 40% of the world export market for sisal and henequen. *Latin America Commodities Report*, March 18, 1977, at 42. In both countries, government agencies strictly control the export sale of fibers. E. Grilli, *The Future for Hard Fibers and Competition from Synthetics* (World Bank Staff Occasional Papers No. 19, 1975), at 43 (hereinafter "Grilli"). In Mexico, CORDOMEX,[12] a government agency, has sole internal and external marketing rights for raw fiber and manufactured cordage products. *Id.* Consequently, the Mexican government, through its agency CORDOMEX, establishes the ex-

[12] The official name of the agency is Cordeleros de Mexico.

port price of fibers. In Brazil, the Sisal Chambers of Commerce of the producing states, with the approval of the Foreign Trade Department of the Bank of Brazil (CACEX) issue licenses, which regulate the size of shipments, and impose strict quality and price controls, including a minimum export price.[13] *Id.* The governments of both countries are encouraging internal cordage production and are seeking to divert raw fibers from export sale to use in domestic manufacturing. *Latin America Commodities Report*, March 18, 1977, at 42. "Brazil seems likely to follow the trend of exporting a minimum of fibre and concentrating on competing in twine markets," while most Mexican henequen now is "[c]onsumed or processed internally." *Id.* To implement these policies apparently, CORDOMEX and CACEX have engaged in discriminatory export pricing practices that result in an insignificant export price differential, if any, between raw fiber and assemblages of fiber, on the one hand, and domestically manufactured rope, on the other hand. These discriminatory export pricing practices have the effect of imposing a levy on exported raw fibers and assemblages of fibers of these two countries. Hooven & Allison must pay this export levy as part of the price of importing its raw materials.[14]

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[13] This Court has recognized that a minimum price has the equivalent effect on commerce as an export tax or tariff. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935).

[14] In addition, there may be no remedy available to Hooven & Allison for such discriminatory practices, other than this Court. The National Soybean Processor Association attacked, pursuant to the Tariff Act of 1974, 19 U.S.C. § 2411 *et seq.*, the differential and discriminatory export taxes levied by Brazil, Malaysia, and Argentina. As part of these countries' policies to encourage domestic manufacturing, they imposed export taxes which favored the export of processed soybean oils over the export of unprocessed soybeans. The United States Trade Representative determined that such differential export taxes did not constitute an export subsidy and, accordingly, declined to initiate an investigation. 48 Fed. Reg. 23947 (May 27, 1983).

On numerous occasions, the exporting countries, from which Hooven & Allison acquires its raw materials, have imposed an explicit export tax on their raw materials. India, Mexico, Brazil, Bangladesh and the Philippines have all from time to time levied an export tax on their exports of raw fibers. The World Bank, *Brazil: Industrial Policies and Manufactured Exports* (1983), at 32, 46, 51; The World Bank, *Export Promotion Policies* (World Bank Staff Working Paper No. 313, 1979), at 46, 68; The World Bank, *Bangladesh: Current Trends and Development Issues* (1979), at 56. Therefore, Hooven & Allison has paid multiple taxes on its imported raw materials to which domestic manufacturers of synthetic rope have not been subject.[15]

It is also possible for the cost of the exporting countries' internal taxes to be passed by the seller to the purchaser, such as Hooven & Allison, resulting in a multiple tax burden. For example, Mexico taxes inventories held for sale, and a seller may reflect this tax in the price charged to a purchaser.[16] The similar effect of tariffs and internal taxes on trade is apparent. K. Dam, THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION (1970), at 115. *Cf.* Belassa, *The Tokyo Round and the Developing Countries*, 14 JOURNAL OF WORLD TRADE LAW 93 (1980) (domestic subsidies have the same effect on exports as direct export subsidies). However, only tariffs are regulated at this time under the General Agreement on Tariffs and Trade. *Id.* Therefore, the multiple tax burdens resulting from internal taxes assessed in the exporting countries remains unchecked.

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[15] Export taxes on other raw materials have also been imposed in the past, such as Malaysian rubber, Argentinian caustic soda, and Ghanaian cocoa. Belassa, *The Process of Industrial Development and Alternative Development Strategies* (World Bank Staff Working Paper No. 438, October, 1980), at 7, 14; Stern, *The Export Tax on Malayan Rubber*, 16 NATIONAL TAX J. 81 (1962). The practice is not rare.

[16] *See* Froomkin, *Some Problems of Tax Policy in Latin America*, 10 NATIONAL TAX J. 370, 377 (1958).

The exporting countries have also used a variety of measures to promote the export sales of their manufactured cordage products, such as export subsidies, tax and duty concessions, preferential financing, and devaluation. United States General Accounting Office, *Report To The Secretary Of Commerce And The United States Trade Representative: Benefits Of International Agreement On Trade-Distorting Subsidies Not Yet Realized* (August 15, 1983), at Appendix III, 66-67; The World Bank, *Brazil: Industrial Policies and Manufactured Exports* (1983), at 67; The World Bank, *Bangladesh: Current Trends and Development Issues* (1979), at 10, 52, 56; The World Bank, *Export Promotion Policies*, at 9, 24, 45-46, 52 (World Bank Staff Working Paper No. 313, 1979). By increasing the cost of Hooven & Allison's cordage products relative to those exporting countries' products, these measures have the equivalent effect of a tax.

The Ohio personal property tax would duplicate the export levy that Hooven & Allison now pays on its imported raw fibers and cause a constitutionally impermissible multiple tax burden. This Court has held that, in determining whether two taxes create a multiple tax burden, the practical effect and not the name of a tax is controlling. "[W]e are dealing in this field," this Court has stated, "with matters of substance, not with dialectics." *International Harvester Co. v. Department of Treasury*, 322 U.S. 340, 347 (1944). In *Henneford v. Silas Mason Co.*, 300 U.S. 577, 586 (1937), this Court noted explicitly that a use tax was "equivalent" to a "tax upon property after importation is over." This Court has similarly held a sales tax paid by the buyer in an interstate transaction to be equivalent to a gross receipts tax paid by the seller in a like transaction. "There is the same practical equivalence whether the tax is on the selling or the buying phase of the transaction." *International Harvester*, 322 U.S. at 348. In short, "equality for the purposes of competition and the flow of commerce is measured in dollars and cents, not legal abstractions." *Halliburton Oil Well Co. v. Reily*, 373 U.S. 64, 70 (1963).

This Court, therefore, has often made clear that the facial neutrality of a state tax statute is not determinative.[17] *E.g., Japan Lines, Ltd.*, 441 U.S. at 446-51. In *Nippert v. City of Richmond*, 327 U.S. 416, 431 (1946), this Court said:

> It is no answer, as appellee contends, that the tax is neither prohibitive nor discriminatory on the face of the ordinance; or that it applies to all local distributors doing business as appellant has done. Not the tax in a vacuum of words, but its practical consequences for the doing of interstate commerce in applications to concrete facts are our concern. To ignore the variations in effect which follow from application of the tax, uniform on the face of the ordinance, to highly different fact situations is only to ignore those practical consequences. In that blindness lies the vice of the tax and of appellee's position.

The Foreign Commerce Clause thus prohibits multiple tax burdens, which have the effect of discriminating against foreign commerce, regardless of the names given to the various taxes. "That issue turns not on the characterization which the state has given the tax, but on its operation and effect." *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69, 84 (1946). *See Developments in the Law — Federal Limitations on State Taxation of Interstate Business*, 75 HARV. L. REV. 953, 967-68 (1962) (nonrepetitive state taxes may cause a discriminatory multiple tax burden). By carving a possible exception in *Michelin Tire* for taxation of imported goods in transit, this Court

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[17] This Court's decision in *Michelin Tire* is not authority for the proposition that the Ohio personal property tax as applied to Hooven & Allison's imported raw materials is not discriminatory because the tax does not fall on imports as such because of their place of origin. The *Michelin Tire* Court did not examine the practical effect of a personal property tax as applied to imported raw materials held for future use in manufacturing. The burdens of double taxation were not discussed in *Michelin Tire*.

recognized that a multiple tax burden may render unconstitutional an otherwise nondiscriminatory state personal property tax. 423 U.S. at 290. *See* W. Hellerstein, *State Taxation and The Supreme Court: Toward A More Unified Approach To Constitutional Adjudication?*, 75 MICH. L. REV. 1426, 1447 (1977) (hereinafter "Hellerstein") ("*Michelin* qualified the nondiscrimination doctrine by disapproving even nondiscriminatory taxes on goods in transit, for such a tax would threaten to saddle imports with burdens not necessarily borne by domestic products.")

"The [Foreign Commerce] clause would thus forbid a tax that threatened to impose a special burden upon imports, even though the levy did not explicitly discriminate against them." *Id.* at 1431-32. The prohibition against cumulative tax burdens was well stated by Justice Rutledge, concurring in *International Harvester*:

> Again, the state may not impose cumulative burdens upon interstate trade or commerce. *Gwin, White & Prince v. Henneford*, 305 U.S. 434; *Adams Mfg. Co. v. Storen*, 304 U.S. 307. Thus, the state may not impose certain taxes on interstate commerce, its incidents or instrumentalities, which are no more in amount or burden than it places on its local business, not because this of itself is discriminatory, cumulative or special or would violate due process, but because other states also may have the right constitutionally, apart from the commerce clause, to tax the same thing and either the actuality or the risk of their doing so makes the total burden cumulative, discriminatory or special.

322 U.S. at 358 (footnote deleted). Therefore, consistent with *Michelin Tire*, this Court must investigate the burden which a state personal property tax imposes on foreign commerce and forbid any tax which imposes a multiple tax burden:

> By reexamining the underlying policies of the clause and the seminal decision construing it, the Court shifted the focus of the analysis away from the intricacies of the "original package" test to the more tractable question of the character of the tax. And in so doing, the Court made clear that the crux of the constitutional inquiry was whether the exaction at issue discriminated against or imposed a special burden upon imported goods.

Hellerstein, 75 MICH. L. REV. at 1434.

Unduly burdensome taxation would result from the Ohio personal property tax and the explicit or *de facto* export taxes to which portions of Hooven & Allison's imported fibers frequently are subject. Both the Ohio tax and the export levy would be imposed cumulatively on fibers that Hooven & Allison imports from particular foreign countries. While it is true that one tax would be assessed against the exporting phase, and the other following the importing phase of the transaction, this is a matter of form and not substance. The practical effect on foreign commerce is the same in either case. The two taxes here are no more different than the taxes on the buying and selling phases of the interstate transaction at issue in *International Harvester*. When both are paid by Hooven & Allison, it is truly taxed twice.

It is no answer to the substantial risk of multiple taxation that the imported raw materials have come to rest, before future use in manufacturing, in a warehouse located in Ohio. Though the imported raw materials have come to rest in Ohio, the state still may not subject them to a cumulative tax burden. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 526 (1934); *Minnesota v. Blasius*, 290 U.S. 1, 8-9 (1933). As this Court has observed,

> If the only thing necessary to sustain a state tax bearing upon interstate commerce were to discover some local incident which might be regarded as sepa-

> rate and distinct from 'the transportation or intercourse which is' the commerce itself and then to lay the tax on that incident, all interstate commerce could be subjected to state taxation and without regard to the substantial economic effects of the tax upon the commerce . . . .

Nippert v. City of Richmond, 327 U.S. at 423. Under the Foreign Commerce Clause, the Court must focus not on the due process nexus question, but "the substantial effects, actual or potential, of the particular tax in suppressing or burdening unduly the commerce." *Id.* at 424. *Accord*, *Japan Line, Ltd.*, 441 U.S. at 451.

The Tax Commissioner cannot argue that Hooven & Allison does not face at least a substantial risk of, if not actual, multiple taxation solely because it must rely on imported raw materials. If Hooven & Allison were able to acquire its raw materials from domestic sources, in all likelihood the only tax burden to which these raw materials would be exposed is the Ohio personal property tax. Yet, the identical raw materials obtained in foreign commerce are exposed to both the foreign export taxes and Ohio personal property tax. The double taxation results solely because of the foreign origin of the raw materials.

This cumulative tax burden could jeopardize Hooven & Allison's business and eventually force it to discontinue all manufacture in this country of cordage products made from natural fibers. Because of discriminatory foreign pricing and taxing practices, it is already possible to purchase imported rope on the American market at approximately the same price per pound as Hooven & Allison must pay for imported fibers. In other cases, as noted above, the export price differential between fibers and rope is so slight that it is nearly impossible for an American manufacturer to convert imported fibers into rope at a competitive price. Since the raw materials that Hooven & Allison requires can be grown only abroad in a few parts of the world, moreover,

Hooven & Allison cannot obtain its raw materials from domestic producers. Consequently, if the Tax Commissioner's position were sustained, Hooven & Allison would be required to bear a cumulative tax burden on its raw materials solely by virtue of its involvement in foreign commerce.

Thus, contrary to the Tax Commissioner's contention, Hooven & Allison is obviously not seeking preferential tax treatment. Hooven & Allison already pays substantial personal property taxation on its goods in process and finished goods inventories. Hooven & Allison is seeking merely to avoid the heavy burden of double taxation, which does not fall on its foreign competitors or its domestic competitors that use domestically available synthetic fibers. Hooven & Allison asks only to be able to compete on an equal basis, as protected by the Foreign Commerce Clause and the Import-Export Clause. Because of foreign export taxation, Hooven & Allison gains no competitive advantage through immunity from Ohio's personal property taxation. Note, *Limitations on State Taxation of Foreign Commerce: The Contemporary Vitality of the Home-Port Doctrine*, 127 U. PENN. L. REV. 817, 852-53 (1979).

Because of the unduly burdensome impact of the Ohio state personal property tax as applied to Hooven & Allison, it is apparent that the Tax Commissioner has framed the wrong question in this case:

> The problem comes down therefore to whether the state or municipal legislative bodies in framing their taxing measures to reach interstate commerce shall be at pains to do so in a manner which avoids the evils forbidden by the commerce clause and puts that commerce actually upon a plane of equality with local trade in local taxation, not as is said to a question of whether interstate trade shall bear its fair share of the cost of local government, the benefit and protection of which it enjoys on a par with local business.

Nippert, 327 U.S. at 434. *Accord, Japan Line, Ltd.*, 441 U.S. at 456-47. Indeed, the Tax Commissioner's narrow-minded focus on foreign commerce paying its share of the state's general tax burden proves too much — the adoption of the Tax Commissioner's argument would immunize all state taxation from judicial review. Furthermore, as the personal property tax, unlike an income or real property tax, bears no relationship to Hooven & Allison's actual use of or benefit from state services, much closer scrutiny than the Tax Commissioner has suggested is required to sustain the tax on the ground that Hooven & Allison is receiving from the state benefits for which it has not paid. Note, *Limitations on State Taxation of Foreign Commerce: The Contemporary Vitality of the Home-Port Doctrine*, 127 U. PENN. L. REV. 817, 847-48 (1979).

In sum, the imposition of Ohio's personal property tax on Hooven & Allison's imported fibers results, in certain cases, in actual international multiple taxation of its imports and, in other cases, in the substantial risk of international multiple taxation of these imports. The Foreign Commerce Clause forbids Ohio from engaging in this multiple taxation.

B. State Personal Property Taxation Of Imported Raw Materials Would Conflict With Federal Regulation Of Foreign Commerce.

International multiple taxation is preeminently a matter for exclusive federal regulation and an area in which national uniformity is essential. *Japan Lines Ltd.*, 441 U.S. at 448. Only through international negotiation and agreement can the problem of international multiple taxation be resolved. The United States is party to a large number of international tax and trade conventions designed, in part, to address this problem. *See, e.g.*, King, *Tax Conventions to Which United States is a Party*, in *Proceedings of the 1960 Institute on Private Investments Abroad*, at 479-492.

The need for federal uniformity is demonstrated in the model tax treaties of the Organization For Economic Cooperation and Development and the United Nations. These treaties state that negotiated tax rates include any state taxes. OECD Model Convention For The Avoidance Of Double Taxation With Respect To Taxes On Income And Capital, Chapter II, Article 2, *reprinted in* 1 Tax Treaties (CCH), ¶151, at 208 (1980); United Nations Model Double Taxation Convention Between Developed And Developing Countries, Chapter I, Article 2, *reprinted in* 1 Tax Treaties (CCH), ¶171, at 282 (1980).

Ohio's taxation of imported raw materials would seriously impair federal regulation of foreign commerce in several significant respects. State taxation could nullify the effect of trade and tax concessions that the federal government has granted in return for foreign concessions and thus disrupt foreign trade patterns. For example, the United States has granted tariff preferences to a number of developing countries, including Brazil, Mexico, India, Bangladesh, the Philippines, and Tanzania, for their exports of hard fibers and cordage. *See Tariff Schedules of the United States Annotated* (1982), §§304.02-.58. A state personal property tax could negate this tariff advantage and hence defeat national foreign policy goals. *See McGoldrick v. Gulf Oil Corp.*, 309 U.S. 414, 429 (1940).

The need for the federal government to speak with one voice also arises from the continuing negotiations among producer nations concerning price stabilization for hard fibers exports. In past years, the producer nations have acted pursuant to an informal agreement, setting export quotas and a minimum price. Grilli, *supra* at 3, 24-31. Negotiations are continuing under the auspices of the United Nations Food and Agriculture Organization and also the United Nations Conference on Trade and Development. *Latin America Commodities Report*, February 17, 1978. Because of the fierce price competition arising from synthetic fibers, a small change in price caused by the effect

of state personal property taxation on imported natural fibers could cause substantial trade distortion and thus complicate international trade and price stabilization negotiations.[18]

Therefore, because of the need for the federal government to speak with one voice in matters of international trade and commodity negotiations, this Court should hold that the Foreign Commerce Clause does not permit the State of Ohio to impose its personal property tax against Hooven & Allison's unused, imported raw materials.[19]

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[18] *See* United States International Trade Commission, *Summary of Trade and Tariff Information: Cotton Linters, Waste, Thread, and Yarn; Vegetable Fibers (Except Cotton and Yarns)* (September, 1982), at 28-29; The World Bank, *A Dynamic Simulation Model of the World Jute Economy* (World Bank Staff Working Paper No. 391, 1980), at 5; Grilli, *supra* at 32, 65.

[19] The Import-Export Clause is also designed to protect imports and duties as a source of federal revenue. *Brown v. Maryland*, 25 U.S. (12 Wheat.) at 439. As noted above, an Ohio personal property tax levied against Hooven & Allison's inventories of imported fibers could risk pricing Hooven & Allison out of the market. As a result, the imposition of Ohio's personal property tax on Hooven & Allison's imported fibers risks depriving the federal government of tariff revenues.

The potential loss of tariff revenues may be illustrated by the following example involving sisal. Unless imported from a foreign country designated as a "beneficiary developing country" with respect to the material imported, assemblages of sisal fiber are subject to a duty of 13.7% of the price prevailing on the date of importation (Tariff Schedules of the United States Annotated (1982), Schedule 3, Part 2, item No. 315.25) (hereinafter "TSUS"); sisal rope of less than ¼" diameter is subject to a duty of .8 cents per pound plus 7.4% of the price prevailing on the date of importation for small size rope (TSUS item No. 315.40); and sisal rope of more than ¼" diameter is subject to a duty of .95 cents per pound (TSUS item no. 315.55). A similar pattern exists with respect to manila (TSUS items No. 315.25, 315.35 and 315.50).

Mexico is one example of a fiber and rope exporting country which is not currently eligible for "beneficiary developing country" status (TSUS, p. 4). As of July, 1982, CORDOMEX, a state-run Mexican concern, sold sisal assemblages of fibers (yarn) for export at 55 cents per pound, and sisal rope at 58 cents per pound. Affidavit of John P. Buck, at ¶5. At then current rates, the United States tariff on imported CORDOMEX yarn was thus 7.5 cents per pound, while the tariff on imported CORDOMEX rope was only 5.1 cents per pound for small-sized rope, and .95 cents per pound for rope of larger size. Consequently, the loss in federal tariff revenues would be substantial, were imports of sisal yarn displaced by imports of sisal rope.

C. State Personal Property Taxation Of Manufacturers' Inventories Of Imported Raw Materials Would Create Interstate Commercial Conflict.

The overriding purpose of the Commerce Clause is to create a free trade area among the states. *Boston Stock Exchange*, 429 U.S. at 317; *A & P Tea Co. v. Cottrell*, 424 U.S. 366 (1976); *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944). Any form of state taxation which might provoke a "multiplication of preferential trade areas" would be destructive of this purpose. *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951). State taxation of manufacturers' inventories of imported raw materials is likely to provoke such interstate commercial rivalry and, therefore, should be prohibited.[20]

Manufacturers, like Hooven & Allison, who are dependent on imported raw materials must maintain large inventories of such materials. They are forced to stockpile raw materials to guard against an uncertain world market, disruption in transportation, and similar factors. In the case of Hooven & Allison, certain of its raw materials are available only seasonally, so that an entire year's supply must be purchased from a supplier at one time and stored in inventory.[21] State property taxation of such inventories represents for Hooven & Allison and other cordage manufacturers a significant cost of doing business.

Whether a state imposes a tax on inventories of raw materials is obviously a major factor in a manufacturer's

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[20] Hooven & Allison does not intend to suggest that all forms of tax exemption, which states regularly use to attract interstate, domestic business, should be constitutionally prohibited. It is only because the likelihood of preferential trade areas would adversely distort the pattern of foreign commerce that Hooven & Allison contends that Ohio's taxation of imported commodities would contravene the Foreign Commerce and Import-Export Clauses.

[21] The seasonal nature of Hooven & Allison's import purchases of fibers is reflected in the variations of the dollar values of its monthly raw material inventories.

decision on where to locate. States use property tax concessions currently to attract importers and exporters of finished goods. Until recently, for instance, California had a "free port statute" designed for this purpose.[22] The potential for conflict is demonstrated by the brief for amicus curiae, The International Association of Assessing Officers, which indicates that perhaps only eighteen states levy taxes on raw materials, like Ohio. Motion for Leave to File Brief Amicus Curiae of The International Association of Assessing Officers, at 3. Given the large amount of economic activity and taxable revenue that manufacturing generates, states would have great incentive to use property tax concessions to lure manufacturers to locate or relocate within their boundaries. The decision in *Michelin Tire*, for this reason, had doubtful value to New York City, which disapproved the assessment of a personal property tax on imports out of fear that it would precipitate a mass exodus of importers to neighboring states. Recent Decisions, 47 Miss. L. J. 789, 798 (1976). Thus, it was predicted that "*Michelin Tire* will induce even greater competition between seaport cities for the rich foreign trade which has shown dramatic increases in recent years." *Id.* Such a multiplication of preferential trade areas would conflict with the most basic aim of the Foreign Commerce Clause by fostering interstate commercial conflict and distorting the flow of foreign commerce. For this reason, too, the imposition of a state personal property tax on imported raw materials should be held unconstitutional.

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[22] The California Supreme Court has struck down this statute as violating the federal Commerce Clause. *Zee Toys, Inc. v. County of Los Angeles*, 85 Cal. App. 3d 763, 149 Cal. Rptr. 750 (1978) *aff'd sub nom., Sears, Roebuck and Co. v. County of Los Angeles*, 449 U.S. 1119 (1981). However, because this Court was evenly divided, its summary affirmance of this case lacks precedential force. Thus, while the Commerce Clause has been construed to bar state taxes which discriminate against foreign commerce, this Court has not held that it bars taxation which discriminates selectively in favor of such commerce.

CONCLUSION

For the foregoing reasons, this Court is urged to dismiss its writ of certiorari as improvidently granted. If the Court should reach the merits of this case, the judgment of the Supreme Court of Ohio should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Brief for Respondent have been served on petitioner by forwarding such copies to Richard C. Farrin, 30 East Broad Street, Columbus, Ohio 43215, counsel for petitioner, by United States mail, postage paid, this 19th day of December, 1983. I further certify that all parties required to be served have been served.

MICHAEL A. NIMS
Attorney for Respondent

APPENDIX A

IN THE SUPREME COURT OF OHIO

Appeal From The Ohio Board of Tax Appeals

THE HOOVEN & ALLISON COMPANY, *Appellant and Cross-Appellee,* v. *EDGAR L. LINDSEY, Tax Commissioner of Ohio, Appellee and Cross-Appellant*	**Case No. 82-559** **Affidavit of John P. Buck in Support of the Brief of Cross-Appellee, The Hooven & Allison Company**

STATE OF OHIO
COUNTY OF GREENE } ss:

John P. Buck, being first duly sworn, says:

1. I am the Vice President and Treasurer of the Hooven & Allison Company ("Hooven"). I have been Treasurer of Hooven since 1965, and Vice President and Treasurer since 1974.

2. I have personal knowledge of all the facts set forth herein, which facts were compiled by me or for me by persons under my supervision from records maintained as part of Hooven's regularly conducted business activity.

3. Hooven imports raw fibers and assemblages of fibers, which in the trade are commonly referred to as "yarns," consisting of sisal, jute and manila, which it processes into rope and cordage products that it sells in its business. Hooven imports, and in prior years has imported, these fibers from a number of foreign countries, including Portugal, Brazil, Bangladesh, Thailand, Ecuador, the Philippines, Haiti, Mexico, Kenya, and Tanzania.

4. Several of the suppliers from which Hooven purchases fibers are foreign corporations that are subject to varying degrees of foreign government regulation as to their ownership, the annual quantity of fibers that they may harvest and sell in export transactions, or the price at which they may sell such fibers and the finished products that they manufacture from them. Foreign corporations operating in the Philippines, from which Hooven regularly purchases manila yarns of Philippine origin, and in Brazil, from which Hooven purchases sisal yarns of Brazilian origin, are subject to government imposed restrictions of one or more of these types. Hooven has also made purchases of fibers from foreign suppliers which are either state-owned or state-controlled entities, such as Cordomex, a Mexican corporation, from which Hooven has acquired sisal fibers of Mexican origin.

5. During the years 1975 and 1976, and for a number of preceding years, as well as for years subsequent to 1976, Hooven has experienced situations in which the price that it pays its suppliers in particular foreign countries for fibers is less by only an insignificant amount than the prices that those suppliers are then charging for rope or other finished cordage products manufactured from the same fiber materials. Currently, Hooven is experiencing this situation in Thailand, where it purchases jute yarn of Thai origin from C.P. Textile. This supplier currently is selling jute yarn for 40.5 cents per pound F.O.B. Baltimore, and two ply jute twine at the price of 41 cents per pound, F.O.B. Baltimore. Hooven is also experiencing this situation currently in Brazil, where it purchases sisal yarn at 48 cents per pound, F.O.B. Baltimore, from Brascorda. This same supplier currently is selling sisal rope at 54 cents per pound, F.O.B. Baltimore. Hooven is also experiencing the same situation currently with respect to sisal products of Mexico origin that Cordomex offers for sale. Cordomex currently is offering sisal yarn for sale at 55 cents per pound, F.O.B.,

Laredo, Texas, and sisal rope at the price of 58 cents per pound, F.O.B. Laredo, Texas. At the present time, it costs Hooven approximately 28 cents per pound to process sisal yarns into a rope product of the same grade that Brascorda and Cordomex are selling for 54 cents per pound and 58 cents per pound, respectively.

6. Hooven has also experienced the same situation as that described in paragraph 3 above in earlier periods. In 1978, for example, Hooven paid 34 cents per pound for jute yarn that it purchased F.O.B. Baltimore from foreign suppliers in Thailand, which at the same time were selling three ply twine manufactured from the same materials for 34.5 cents per pound, F.O.B. Baltimore.

7. In recent years, Hooven has experienced situations in which the price that it pays its suppliers in particular foreign countries for certain grades and sizes of fiber materials equals or exceeds the price which those suppliers are then charging for rope and other finished cordage products manufactured from the same fiber materials. Currently, Hooven is experiencing this situation in the Philippines, where, with respect to the manila yarn that it imports from that source, it must pay its Philippine suppliers 50.5 cents per pound, F.O.B. Manila, for manila yarn. These same suppliers currently are offering finished manila rope for sale at the following prices:

Grade of Manila Rope	Price Per Pound F.O.B. Manila
Heavy	48 cents
Medium	50 cents
Small	53 cents

8. Hooven has also experienced the same situation as that described in paragraph 5 above in earlier periods. In 1978 and 1979, for example, African sisal fibers of Portuguese East African origin were selling for 43 cents per

pound, F.O.B. Baltimore. In those same years, Hooven paid 40.75 cents per pound, F.O.B. Baltimore, for two and three ply sisal twine of Portuguese East African origin that it purchased from Sicor.

9. The examples of pricing and the price differentials referred to in paragraphs 3, 4 and 5 above do not reflect the universal practice of all foreign suppliers which sell fibers and cordage products in export transactions. The instances in which Hooven has experienced such pricing practices, however, have occurred frequently in connection with its purchases of fibers from foreign suppliers.

John P. Buck

Sworn to before me and subscribed in my presence this 12th day of July, 1982.

Anne C. Buettner
Notary Public

APPENDIX B

Ohio Supreme Court Rule VIII, §7 provides:

To facilitate the consideration and disposition of original actions, counsel should, whenever possible, file an agreed statement of facts.

Where a case has not been submitted by the parties to the Court for final determination at the time of or for filing of a reply, it shall be referred to the Clerk of the Supreme Court, and the parties shall appear before such Clerk at such reasonable time and place as he may designate on not less than ten days notice and shall there present or make arrangements for presenting all evidence which they desire to offer.

No. 83-96

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JOANNE LIMBACH,
TAX COMMISSIONER OF OHIO,
Petitioner,

v.

THE HOOVEN & ALLISON COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF OHIO

REPLY BRIEF FOR THE PETITIONER

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ARGUMENT

I. THIS COURT'S DECISION IN *MICHELIN* RENDERS INAPPLICABLE THE DOCTRINE OF COLLATERAL ESTOPPEL BASED ON *HOOVEN I.*

Respondent has misstated both the Tax Commissioner's argument and the holding of this Court in *Commissioner v. Sunnen*, 333 U.S. 591 (1948). Respondent initially states

that the Tax Commissioner argued only that *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976) overruled *Hooven & Allison Co. v. Evatt*, 324 U.S. 652 (1945) (*Hooven I*) as a matter of law. Brief for Respondent, at 10.

This statement is inaccurate in two ways. First, the Tax Commissioner's initial contention is that because *Michelin* repudiated the "original package" doctrine it overruled in principle all of the cases which were based upon that doctrine and that *Hooven I* was one of those cases. Second, this is not the Tax Commissioner's only contention, as respondent recognizes by its attack on the Tax Commissioner's reliance on *Commisioner v. Sunnen*. As a review of the Tax Commissioner's second argument in her Brief for the Petitioner clearly reveals, the Tax Commissioner has contended that even if *Michelin* is not viewed as overruling *Hooven I* in principle it did effect a change in the controlling legal principle upon which *Hooven I* was based and under the limitations enunciated in *Sunnen* the Ohio Supreme Court improperly applied collateral estoppel based upon *Hooven I* to the assessment at issue.

Respondent also misstates the Tax Commissioner's argument regarding the limitation on the doctrine of collateral estoppel. Respondent states that "the Tax Commissioner has contended, that every change in the legal atmosphere surrounding a prior decision of this Court empowers an inferior tribunal to ignore the collateral estoppel effect of that decision." Brief for Respondent, at 11. That is not the Tax Commissioner's contention. The Tax Commissioner's argument is that collateral estoppel is inapplicable where an intervening decision of this Court *(Michelin)* has changed the controlling legal principles upon which the prior decision *(Hooven I)* was based.

This argument is based upon this Court's decision in *Sunnen*. Respondent argues that the Tax Commissioner

has read *Sunnen* much too broadly. The invalidity of this argument is demonstrated by the fact that the Tax Commissioner used the exact words of *Sunnen* in stating her argument:

> But a subsequent modification of the significant facts or a *change or development in the controlling legal principles* may make that determination obsolete or erroneous, at least for future purposes. (emphasis added) 333 U.S., at 599.

It is noteworthy that this is the very portion of *Sunnen* cited to by respondent in support of its statement that "[t]he decision in *Sunnen* stands for the accepted proposition that collateral estoppel does not operate in the event of a major change in the controlling facts or a reversal in the applicable legal principles. *Id.* [Sunnen] at 599." Brief for Respondent, at 11. Respondent repeats this inaccurate and misleading statement throughout its argument, stating that collateral estoppel applies unless the prior decision has been reversed or overruled. As the above-quoted language of *Sunnen* clearly establishes, this is not the holding of that case. At no point in *Sunnen* is it even suggested that the application of collateral estoppel is restricted only where the controlling legal principles have been reversed or overruled. Rather, the decision expressly holds that the doctrine is inapplicable where there has been a "change in the legal atmosphere" or a "modification or growth in legal principles as enunciated in intervening decisions of this Court." 333 U.S., at 600.

Moreover, contrary to respondent's assertion, this is the exact interpretation of the limitation on the doctrine followed by this Court in *Montana v. United States*, 440 U.S., 147 (1979). As stated by the *Montana* Court, the relevant inquiry is "whether controlling facts or legal principle have changed significantly . . ." 440 U.S., at

155. The Court clearly adopted the holding of *Sunnen* regarding the application of the doctrine. *Id*, at 161. Just as clearly, the Court did *not* hold or even imply, as respondent suggests, that only a reversal or overruling of the controlling legal principles would preclude application of the doctrine.

Respondent argues that *Michelin* did not effect a change in the controlling legal principles under which *Hooven I* was decided. Respondent bases this argument upon the fact that *Michelin* concerned the applicability of a nondiscriminatory state ad valorem tax to imported inventory held for resale while *Hooven I* concerned the applicability of such a tax to imported raw materials held for intended use in manufacturing. Taxpayer's argument is simply unfounded. *Hooven I* did not depend on the fact that raw material inventory was involved as opposed to inventory held for resale. The basis of *Hooven I* was that the tax challenged was attempted to be imposed upon imported inventory held in its original package.

Hooven I expressly recognized that whether the imported goods were held for resale or for use in manufacture was not relevant to a determination of its immunity from taxation under the Import-Export Clause:

> We do not perceive upon what grounds it can be thought that imports for manufacture lose their character as imports any sooner or more readily than imports for sale. 324 U.S., at 667.

Following the century-old "original package" test applied to imported goods held for sale in *Low v. Austin*, 13 Wall. 29 (1872), *Hooven I* held that the same test prohibited the imposition of a nondiscriminatory state ad valorem

property tax on imported raw materials held for use in manufacturing.[1]

Michelin repudiated the "original package" doctrine upon which *Hooven I* was based, thereby effecting a change in the controlling legal principle of that decision and rendering the rule of collateral estoppel based on *Hooven I* inapplicable. Under the "original package" doctrine, the Import-Export Clause was viewed as a broad prohibition against all taxes on imported goods, including nondiscriminatory state ad valorem property taxes. *Michelin* held that the prohibition was only against the imposition of "imposts" and "duties" and that a nondiscriminatory state ad valorem property tax was neither an "impost" nor a "duty" and was therefore not prohibited by the Import-Export Clause.

While it is true, as respondent states, that *Michelin* did not hold that all forms of nondiscriminatory state personal property taxation are permitted, it did hold that all such taxes applied to imported goods no longer in transit are permitted under the Import-Export Clause. Respondent's reliance on *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979) as limiting the holding in *Michelin* is misplaced. *Japan Line, Ltd*, was not an Import-Export Clause case; it struck down the imposition of California's nondiscriminatory ad valorem property tax on Commerce Clause grounds. Furthermore, the personal property involved in *Japan Line, Ltd.*, were foreign-owned and domiciled instrumentalities of foreign commerce (cargo containers) which were only temporarily located in various

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[1] The Tax Commissioner's argument that *Hooven I* was based upon the "original package" doctrine formalized in *Low v. Austin* is fully set forth in the Brief for the Petitioner, at 16-20. J. Hellerstein, *STATE TAXATION*, ¶ 5.2[1] at 179 (1983), further supports this argument.

California ports and were used exclusively in international commerce. By their very nature, the cargo containers were still in transit. This Court noted the narrow scope of the question before it in *Japan Line, Ltd.*, 441 U.S. at 444; *Container Corp. of America v. Franchise Tax Board*, 103 S. Ct. 2933, 2952 n. 24 (1983).

Respondent's statement that *Hooven I* and *Michelin* reached different conclusions based on the divergent impact of the taxes (Brief for Respondent, at 14) is spurious. The result of *Michelin* differed from that in *Hooven I* because *Michelin* repudiated the legal principle upon which *Hooven I* was based and applied a fundamentally different legal analysis which focused on the nature of the tax rather than on whether the goods upon which the tax was levied had lost their status as imports. *Washington Revenue Dept. v. Association of Washington Stevedoring Cos.*, 435 U.S. 734, 752 and 758-760; P. Hartman, *Federal Limitations on State and Local Taxation* § 5:4 at 198-199 (1981); J.. Hellerstein, *State Taxation* ¶ 5.4 at 176-177 (1983); W. Hellerstein, *State Taxation and the Supreme Court: Toward a More Unified Approach to Constitutional Adjudication?*, 75 Mich. L. Rev. 1426 (1977).

Because *Michelin* clearly repudiated the legal principle upon which *Hooven I* was decided, the Ohio Supreme Court erroneously applied the doctrine of collateral estoppel and failed to follow this Court's decision in *Sunnen*.

II. THE IMPOSITION OF OHIO'S NONDISCRIMINATORY AD VALOREM PROPERTY TAX ON IMPORTED GOODS NO LONGER IN TRANSIT AND HELD IN THAT STATE FOR USE IN MANUFACTURE IS NOT PROHIBITED BY THE IMPORT–EXPORT CLAUSE OF THE UNITED STATES CONSTITUTION.

Respondent begins its argument by correctly noting that the only issue properly before this Court is whether the Ohio Supreme Court correctly held that this Court's decision in *Michelin* did not preclude the application of collateral estoppel based upon *Hooven I* to the assessment at issue.[2] The only facts necessary to determine this issue are that the taxes at issue in both *Hooven I* and *Michelin* are of the exact type as that at issue in the present case - a nondiscriminatory state ad valorem property tax - and that the imported goods against which the assessment at issue was attempted were no longer in transit.

While it may be necessary to consider the Import-Export Clause in determining the collateral estoppel issue, the Commerce Clause has no relevance to the collateral estoppel issue. Neither *Hooven I* nor *Michelin* even remotely involved the Commerce Clause. Similarly, in its decision below, the Ohio Supreme Court placed no re-

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[2] Repondent's assertion that the collateral estoppel issue is a state law question is unfounded. The decision upon which collateral estoppel was applied by the Ohio Supreme Court was not a state court decision, but a decision of this Court, *Hooven I*, dealing solely with a federal constitutional issue, the Import-Export Clause. The decision upon which the Tax Commissioner relied was also a decision of this Court, *Michelin*, which also dealt solely with the Import-Export Clause.

liance whatsoever on the Commerce Clause. That court specifically refrained fron deciding the Commerce Clause issue raised by respondent.

Although respondent had filed an appeal to the Ohio Supreme Court from the Ohio Board of Tax Appeals claiming that the Board had failed to determine the constitutional issues it had raised at the Board, it did not file a cross-petition with this Court from the Ohio Supreme Court's failure to determine those issues. It now seeks to raise those issues in its brief.

The Tax Commissioner submits that those constitutional issues, particularly the Commerce Clause issue, are not properly before this Court and urges the Court to so hold.[3]

The fact that these issues were not decided below and that respondent did not cross-petition this Court to consider them answers to respondent's suggestion that the Tax Commissioner was remiss in not addressing those issues. Furthermore, respondent's statement that the Tax Commissioner has completely ignored the policies underlying the Import-Export Clause enunciated in *Michelin* is untrue. The Tax Commissioner specifically addressed these policies in her discussion of the holding in *Michelin*. Brief for the Petitioner, at 15-16.

With respect to the Commerce Clause issue the Tax Commissioner agrees with respondent's statement that the record is barren of facts (Brief for Respondent, at 16), with the exception of the following: the imported goods assessed were no longer in transit; the imported goods were raw

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[3] The Tax Commissioner would note to the Court that the only Commerce Clause or Import-Export Clause issue raised by the respondent in its appeal to the Board of Tax Appeals was that imposition of the tax would impair the federal government's regulation of foreign trade. Pet. App. A-17.

materials intended for use in manufacturing; and the tax at issue is a nondiscriminatory state ad valorem property tax which is imposed on all property used in business in Ohio. However, the Tax Commissioner strongly contests respondent's suggestion that the absence of evidence is due to the Tax Commissioner's failure.

Any lack of evidence is due solely to the failure of respondent to present such evidence before the Ohio Board of Tax Appeals. Respondent was the party contending that its property was constitutionally immune from the tax and therefore had the burden of establishing its immunity. *Norton Co. v. Department of Rev.*, 340 U.S. 534, 537 (1951); *Central R. Co. of Pa. v. Pennsylvania*, 370 U.S. 607, 613 (1961); *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 463 (1959); *Washington Revenue Dept. v. Association of Washington Stevedoring Cos.*, 435 U.S. 734, 750-751 (1978). Apparently relying on its collateral estoppel attack, respondent failed to make a factual record before the Board of Tax Appeals on which to base its constitutional claims on appeal. In fact, respondent waived its right to evidentiary hearing before the Board. Pet. App. A-19.

Because any lack of factual support for respondent's contention that its property is immune from the tax at issue under the Commerce Clause or as violating three policies of the Import-Export Clause, as enunciated in *Michelin*, is due to respondent's failure to present any such evidence, its argument that this Court should not decide this case because of the absence of such facts is disingenious.

Assuming, *arguendo*, that this Court determines that the constitutional issues raised by respondent, in addition to the constitutional issue inherent in the collateral estoppel issue, are properly before it, the Tax Commissioner will address those issues.

Respondent argues that the imposition of Ohio's nondiscriminatory ad valorem property tax on its imported raw material inventory would violate the Import-Export Clause and the Commerce Clause of the United States Constitution in three ways. The first violation alleged is that imposition of such tax would subject respondent to international multiple taxation. In support of this argument, respondent relies on *Japan Lines, Ltd v. County of Los Angeles*, 441 U.S. 434 (1979). The other two grounds on which respondent relies are identical to the three concerns which the Framers of the Constitution sought to alleviate by the inclusion of the Import-Export Clause in the United States Constitution. *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285-286 (1976).[4]

A. Imposition of Ohio's Nondiscriminatory Ad Valorem Property Tax Would Not Result In International Multiple Taxation.

Respondent's argument ignores a crucial fact which is fatal to its argument. The property at issue herein has clearly come to rest in Ohio. The tax was assessed only on the imported raw material inventory stored by respondent in a warehouse in its Xenia, Ohio plant. Pet. App. A-2, A-12. This property remains in the warehouse until it is used by respondent in the manufacture of cordage.

This Court reaffirmed a basic limitation on the scope of the immunity provided by the Commerce Clause in

[4] Respondent's second ground apparently combines the first and second concerns noted in *Michelin*. The only argument advanced by respondent regarding the reduction of tariff revenues is in a footnote to its argument that imposition of the tax would conflict with federal regulation of foreign commerce. Brief for Respondent, at 35 n. 19. Respondent's third ground does have some Commerce Clause overlap.

Minnesota v. Blasius, 290 U.S. 1, 8 (1933):

> But because there is a flow of interstate commerce which is subject to the regulating power of the Congress, it does not necessarily follow that, in the absence of of a conflict with the exercise of that power, a State may not lay a nondiscriminatory tax upon property which, although connected with that flow as a general course of business, has come to rest and acquired a situs within the State.

The Court noted that "[t]he 'crucial question,' in determining whether the State's taxing power may thus be exerted, is that of 'continuity of transport' ". *Id.*, at 9. Thus, over Commerce Clause objections, the Court held as follows with respect to property no longer in transit:

> Where property has come to rest within a State, being held there at the pleasure of the owner, for disposal or use, so that he may dispose of it either within the state, or for shipment elsewhere, as his interest dictates, it is deemed to be a part of the general mass of property within the State and is thus subject to its taxing power. *Id.*, at 10.

Accord, Sonneborn Bros. v. Keeling, 262 U.S. 506, 508-509 (1923); *Henneford v. Silas Mason Co.*, 300 U.S. 577, 582 (1937); *International Harvester Co. v. Dept. of Treasury*, 322 U.S. 340, 348 (1944) The instant case fits squarely within the above holdings.

Furthermore, even assuming, *arguendo*, that the tax was subject to the Commerce Clause strictures, respondent's reliance on *Japan Line Ltd.* reveals a basic misconception of the holding in that case. This Court specifically recognized that the issue before it in *Japan Line Ltd.* was a

"narrow one, that is, whether instrumentalities of commerce that are owned, based and registered abroad and that are used exclusively in international commerce, may be subjected to apportioned ad valorem property taxation by a State.' " 441 U.S., at 444 (footnote omitted).

This Court recognized that the two additional considerations it applied in *Japan Line Ltd.* - the enhanced risk of multiple taxation and the possibility that a state tax will impair federal uniformity in an essential area - come into play only "when a state seeks to tax the instrumentalities of foreign commerce." *Id.*, at 446. The Court recognized that these considerations would not be applicable where "No foreign business or vessel is taxed." *Id.*, at 449, n. 14, quoting from *Washington Revenue Dept.*, 435 U.S., at 754.

In *Container Corp. of America v. Franchise Tax Board*, 103 S. Ct. 2933 (1983), this Court reemphasized the narrowness of its holding in *Japan Line Ltd.* and distinguished that decision on a ground that is equally applicable in the instant case:

> The third difference between this case and *Japan Line* is that the tax here falls, not on the foreign owners of an instrumentality of foreign commerce, but on a corporation domiciled and headquartered in the United States. 103 S. Ct., at 2952.

The risk of multiple taxation was inherent in *Japan Line Ltd.* because a foreign-owned and domiciled instrumentality of commerce was involved. The Court explained the reason for the inherent risk:

> If an instrumentality of commerce is domiciled abroad, the country of domicile may have the right, consistent with the custom of nations, to

> impose a tax on its full value. If a State should seek to tax the same instrumentality on an apportioned basis, multiple taxation inevitably results. 441 U.S., at 447.

Such a risk is not inherent or even possible in the instant case. The property against which the tax was assessed was imported raw material inventory which was no longer in transit and had come to rest permanently in Ohio. The only taxable situs of the property was Ohio. Because no other state or country has the right or authority to impose the same or a similar tax upon the property, no risk of multiple taxation exists. *Wheeling Steel Corp. v. Fox*, 298 U.S. 193, 208-209 (1935); *Curry v. McCanlass*, 307 U.S. 357, 364 (1939).

In *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 260 (1938), this Court recognized that a multiple burden cannot occur when "[T]he tax is not one which in form or substance can be repeated by other states . . ." *Accord, Washinton Revenue Dept., supra*, at 746-747; *International Harvester Co. v. Evatt*, 329 U.S. 416, 423 (1947).

Assuming, *arguendo*, that some of the exporting countries imposed levies on the exporting of property upon which Ohio sought to impose its nondiscriminatory ad valorem tax after it had come to rest in Ohio, such fact would not result in multiple taxation. Multiple taxation occurs only when more than one state or country levies the same or similar tax on the same segment of the interstate transaction. As held by this Court in *Central R. Co. of Pa. v. Pennsylvania*, 370 U.S. 607, 612 (1962):

> It is only "multiple taxation of interstate operations," *Standard Oil Co. v. Peck*, 342 US 382, 385, 96 L ed 427, 430, 72 S. Ct. 309, 26 ALR2d 1371, that offends the Commerce Clause. And

> obviously multiple taxation is possible only if there exists some jurisdiction, in addition to the domicile of the taxpayer, which may constitutionally impose an ad valorem tax.

Accord, Exxon Corp. v. Wisconsin Dept. of Revenue, 447 U.S. 207, 228, n. 12 (1980).

An export levy on the privilege of exporting goods out of a country is vastly different from a nondiscriminatory personal property tax imposed upon all property held for use in business within a state after it has come to rest in that state. The very basis of the *Michelin* decision was that a state nondiscriminatory ad valorem property tax was clearly not like a duty on imports or exports:

> Unlike imposts and duties, which are essentially taxes on the commercial privilege of bringing goods into a country, such property taxes are taxes by which a State apportions the cost of such services as police and fire protection among the beneficiaries according to their respective wealth; . . . . 423 U.S., at 287.

Respondent's reliance on *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937) to support its assertion that Ohio's ad valorem tax is the practical equivalent of an export levy is misplaced. In fact, *Henneford* directly rejects such a contention. In that decision, this Court explicitly held that a tariff and a tax on property after importation had ended are two different and distinct types of exactions. 300 U.S., at 586.

It was respondent's burden to demonstrate that imposition of Ohio's nondiscriminatory ad valorem property tax will result in multiple taxation. *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 463 (1959); *Standard Pressed Steel Co. v. Washington Revenue Dept.*, 419 U.S. 560, 563 (1975); *Washington Revenue Depart-*

ment v. Association of Washington Stevedoring Cos., 435 U.S. 734, 750-751 (1978). Respondent has failed to meet that burden. Respondent has failed to present any specific evidence that its imported goods were subjected to the same or similar taxes by any other taxing jurisdiction.[5] Such a demonstration could not be made with respect to the tax at issue because the property was permanently sitused in Ohio and no other state or country had the authority to impose an ad valorem tax on the goods.

B. Imposition of Ohio's Nondiscriminatory Ad Valorem Property Tax Would Not Conflict With Federal Regulation of Foreign Commerce.

This Court's decision in *Michelin* is controlling on this question.[6] This Court specifically held that nondiscriminatory property taxation can have no effect whatsoever on federal regulation of foreign commerce because such a tax

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[5] The affidavit of John P. Buck fails to support respondent's multiple taxation assertion. Furthermore, it is not a part of the record before this Court. The affidavit was not presented into evidence at any stage of the proceedings below - it was simply appended to respondent's brief filed with the Ohio Supreme Court. Respondent's reliance on Rule VIII, Section 7 of the Rules of Practice of the Ohio Supreme Court ignores the fact that Rule VIII applies only to original actions and that it sets forth a procedure for the presentation of evidence. This case was before that Court on appeal, not as an original action. Additionally, the record will reveal no motion or pleading by the respondent seeking the introduction of any additional evidence before that Court.

[6] In *Japan Line Ltd.*, this Court noted that the inquiry regarding the effect of a state tax on the federal government's regulation of foreign commerce is the same whether the Import-Export Clause or the Foreign Commerce Clause is involved. 441 U.S., at 449 n.14.

does not fall on imports by reason of their origin. This Court noted that such a tax could not be used to create special tariffs or to favor certain domestic goods or to encourage or discourage importation of goods. 423 U.S., at 286. *Accord, Washington Revenue Dept. v. Association of Washington Stevedoring Cos., supra,* at 753-754. The reason that the tax cannot be used in such a manner is that it applies to all property used in business in the state, regardless of origin.

Respondent's argument ignores the fact that the tax at issue is imposed on the domestic manufacturer, not on the foreign supplier.[7] The price charged by the exporter will not be affected by the tax because the exporter does not pay the tax nor is it passed on to him by the buyer. The tax is imposed on all imported goods and domestic goods regardless of the source. Therefore, it cannot even conceivably confer an advantage upon certain foreign or domestic suppliers.

Because the tax is imposed on all property used in business in Ohio regardless of its source, it cannot have any effect on where a manufacturer chooses to obtain its goods. This demonstrates the utter lack of foundation for respondent's argument that imposition of the tax could nullify the effect of federal trade and tax concessions and tariff preferences.

Respondent's reliance on the Model Conventions[8] as an indication of the need for federal uniformity is misplaced.

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[7] This Court found this factor to weigh against the possibility of any retaliation by foreign trading partners. *Container Corp. of America v. Franchise Tax Board,* 103 S. Ct. 2933, 2955-2956 (1983).

[8] OECD Model Convention For The Avoidance of Double Taxation With Respect To Taxes On Income And Capital, Chapter II, Article 2, *reprinted in* 1 Tax Treaties (CCH),

Initially, the conventions are model ones, not ones entered into by the United States. Second, even if the Model Conventions indicated a federal policy, a review of each of the Model Conventions reveals that property is taxed in the state wherein the property is situsued. Chapter IV, Art. 22 of each Model Convention, I Tax Treaties (CCH), ¶ 151, at 215, ¶ 171, at 291. This is wholly consistent with Ohio's taxation of property held for business use within its borders.

This Court made it clear in *Container Corp. of America v. Franchise Tax Board*, 103 S. Ct. 2933, 2955 (1983) that absent an explicit directive from Congress it would not infer that impositon of a tax would violate the "one-voice" standard unless the Court could determine that the tax would directly implicate foreign policy issues which must be left to the federal government. The three factors relied on by this Court in *Container Corp.* in determining whether retaliation was likely to result if the tax at issue therein was imposed, 103 S. Ct., at 2955, 2956, weigh even more heavily against such a possibility in the instant case.

Respondent has failed to demonstrate how the tax would implicate foreign policy or to cite a single federal directive prohibiting imposition of the tax. It is suggestive of the lack of any federal foreign policy implications that the Executive Branch has chosen not to file an *amicus curiae* brief in opposition to the tax. *Id.*, at 2956. Certainly, if the federal government believed that its regulation of foreign commerce was threatened by the imposition of state ad valorem taxes on imported goods no longer in

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¶ 151, at 208 (1980); United Nations Model Double Taxation Convention Between Developed and Developing Countries, Chapter I, Article 2, *reprinted in* 1 Tax Treaties (CCH), ¶ 171, at 282 (1980).

transit, it would have taken some form of action to remove that threat in the now more than seven years since this Court's decision in *Michelin*.

In a footnote, respondent argues that imposition of the tax would violate the second concern of the Import-Export Clause recognized in *Michelin*, the federal government's exclusive right to all revenues from imposts and duties. Brief for Respondent, at 35 n. 19. This argument is directly refuted by this Court's decision in *Michelin*. This Court held that because a nondiscriminatory ad valorem property tax is not an impost or duty on imports, the federal government is deprived of nothing to which it is entitled. 423 U.S., at 286-287. Respondent's argument that imposition of the tax on its imported goods would indirectly reduce federal tariff revenues was specifically addressed in *Michelin*:

> It may be that such taxation could diminish federal impost revenues to the extent its economic burden may discourage purchase or importation of foreign goods. The prevention or avoidance of this incidental effect was not, however, even remotely an objective of the Framers in enacting the prohibition. *Id.*, at 287.

C. Imposition of Ohio's Nondiscriminatory Ad Valorem Property Tax Would Not Create Interstate Commercial Conflict.

Respondent's argument reveals a basic misconception of the free flow of trade among the states aspects of the Commerce Clause and the Import-Export Clause. As *Michelin* noted, the Import-Export Clause was intended to prohibit the seaboard states from imposing exactions which were no more than transit fees on property passing through those states. 423 U.S., at 285, 288-290. The Court held that a nondiscriminatory ad valorem property tax stood

on a different footing and did not therefore violate the Import-Export Clause, at least as imposed upon imported goods no longer in transit. *Id.*, at 288-290.

The Commerce Clause prohibits a state from imposing a taxing scheme which discriminates against interstate commerce by providing a direct commercial advantage to local business. *Boston Stock Exchange v. State Tax Com.*, 429 U.S. 318, 329 (1977). Clearly, Ohio's personal property tax provides no such advantage. It does not apply only to goods held for use in business in Ohio which were acquired from another state or country. It is imposed upon all goods regardless of their source and is therefore nondiscriminatory.

Respondent argues that imposition of the tax will cause interstate conflict because a manufacturer's decision on where to locate will be affected by whether a state imposes a property tax on raw materials and that states may use this fact to lure manufacturers by structuring their tax laws to alleviate this burden. This argument is directly refuted by this Court's decision in *Boston Stock Exchange:*

> Our decision today does not prevent the states from structuring their tax systems to encourage the growth and development of interstate commerce and industry. Nor do we hold that a State may not compete with other states for a share of interstate commerce; such competition lies at the heart of a free trade policy. We hold only that in the process of competition, no State may *discriminatorily* tax a product manufactured or the business operations performed in any other State. (emphasis added). 429 U.S., at 336-337.

Because Ohio's personal property tax is imposed upon all property held for use in business whether it was acquired in Ohio or elsewhere, it is not discriminatory and cannot affect the free flow of trade.

CONCLUSION

For the reasons set forth in the foregoing brief, the judgment of the Supreme Court of Ohio should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the required number of copies of the foregoing Reply Brief have been served on the respondent by forwarding such copies to Michael A. Nims, Kenneth E. Updegraft, Jr., and Charles H. Mollenberg, Jr., Jones, Day, Reavis & Pogue, 1700 Union Commerce Building Cleveland, Ohio 44115, counsel for respondent, by United States mail, postpaid, this _____ day of February, 1984. I further certify that all parties required to be served have been served.

RICHARD C. FARRIN
Assistant Attorney General

No. 83-96

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JOANNE LIMBACH,
TAX COMMISSIONER OF OHIO,

Petitioner,

vs.

THE HOOVEN & ALLISON COMPANY,

Respondent.

On Petition For Writ Of Certiorari To
The Supreme Court Of Ohio

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE INTERNATIONAL ASSOCIATION OF ASSESSING OFFICERS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE INTERNATIONAL ASSOCIATION OF ASSESSING OFFICERS

The International Association of Assessing Officers hereby respectfully moves for leave to file a brief amicus curiae in the above-captioned case in support of the Petitioner. The consent of the attorneys for the Petitioner has been obtained, and they have advised counsel for the International Association of Assessing Officers in telephone conversations that they will forward their written consent to the Clerk of the Supreme Court. The consent of the attorney for the Respondent was sought, but he

did not return phone calls placed by counsel for the International Association of Assessing Officers.

The International Association of Assessing Officers (IAAO) has approximately 7,800 members. Most of the members are employees of state and local governments. The members reside in all 50 states and other countries. The Association is primarily interested in property tax assessment. The eight objectives of IAAO as stated in the IAAO Constitution, Art. 1, Sec. 2, amended as of November 15, 1982, are as follows: (1) to improve the standards of assessment practice; (2) to educate those engaged in assessment practice; (3) to elevate the standards of personnel requirements in assessment offices; (4) to educate the general public in matters relating to assessment practice; (5) to engage in research and to publish the results of studies in assessment administration; (6) to provide a clearing-house for the collection and distribution of useful information relating to assessment practice; (7) to cooperate with other public and private agencies interested in improving assessment administration; and (8) to promote justice and equality in the distribution of the property tax burden.

Although most of the members of the Association are engaged in assessment administration for property tax purposes at the state and local levels of government, the Association is not a "trade union" for assessors, but rather, is a nonprofit, educational institution interested in promoting proper and equitable property taxation. In that role, the Association has often been invited to present testimony to Congress and to state and local legislative bodies when proposals relating to the property tax have been considered. In a related effort, the Association also submits amicus curiae briefs in court cases that might have a substantial impact on the property tax and/or the assessment profession.

The case before the Court could have such a substantial impact. As noted in the Petition for Writ of Certiorari (p. 16), the decision of the Supreme Court in the instant case could have a significant detrimental effect upon the finances of the State of Ohio if the Court rules for the Respondent. Other states could be affected in a similar manner, since at least 18 of them, according to the Association's records, levy taxes on raw materials like the subject property in the instant case. The state and local governments which employ most of the members of the amicus Association would lose much badly needed revenue if the Court's decision in this case results in the automatic exemption of imported raw materials from ad valorem taxation where the imports remain in their original packages, or if the Court holds that collateral estoppel prevents Ohio from levying such taxes in the case at bar. In either event, litigation expenses associated with assessment appeals resulting from the resuscitation of the "original package" doctrine would also drain state and local treasuries, since assessing officers have believed for years that the original package doctrine was justifiably put to death by this Court in *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976), and have not referred to that doctrine in determining whether imports should be taxed, even where identical goods under identical ownership were held exempt from taxation under the original package doctrine in court cases preceding the *Michelin* decision.

Aside from the financial impact the instant case could have upon state and local government, the amicus Association anticipates gross inequities in ad valorem property tax burdens resulting from a decision for the Respondent in the case at bar. Imported raw materials stored in their original packages could be exempted from taxation, while

imported raw materials removed from their original packages, or not packaged at all, would be subject to taxes, along with domestically produced manufacturers' inventories. Raw materials belonging to property owners who were in operation before the *Michelin* decision, and who successfully appealed assessments on identical materials, obtaining a judicial ruling that the goods were exempt under the original package doctrine, could not be taxable by state and local governments, while all other imported raw materials would be taxable.

Exemptions of the sort proposed by the Respondent for its raw materials also tend to result in increased taxation of non-exempt properties and/or a reduced level of state and local government services to the citizenry. Such developments are of vital interest to all state and local government employees, and particularly those who administer the property tax, as well as others who have dedicated themselves to making the property tax a more viable and equitable method of taxation.

The amicus Association is in a unique position to assess for the Court the probable impact of a decision for the Respondent in this case. The Association is aware of the extent to which property has already been exempted from taxation in the United States and around the world, and of the damage, in terms of assessment inequity and reduced state and local government services, which has been partly caused by current exemptions. Yet the Association is aware that responsible and humane public policy requires that many property tax exemptions continue to exist, and the Association can view the potential costs and benefits of a ruling for the Respondent in this case with a certain objectivity that neither of the parties to the case can be expected to demonstrate.

Because of the Association's interest in the outcome of this case and because the Petitioner cannot fairly be expected to address in a complete fashion the broader implications of the Respondent's contentions, the International Association of Assessing Officers respectfully requests leave to file the attached brief amicus curiae. The arguments set forth in the brief amicus curiae are relevant to disposition of this case.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE INTERNATIONAL ASSOCIATION OF ASSESSING OFFICERS

INTEREST OF AMICUS CURIAE

The International Association of Assessing Officers (IAAO) has approximately 7,800 members. Most of the members are employees of state and local governments. The members reside in all 50 states and in other countries. The Association is primarily interested in property tax assessment.

The eight objectives of IAAO as stated in the IAAO Constitution, Art. 1, Sec. 2, amended as of November 15, 1982, are as follows: (1) to improve the standards of assessment practice; (2) to educate those engaged in assessment practice; (3) to elevate the standards of personnel requirements in assessment offices; (4) to educate the general public in matters relating to assessment practice; (5) to engage in research and to publish the results of studies in assessment administration; (6) to provide a clearing-house for the collection and distribution of useful information relating to assessment practice; (7) to cooperate with other public and private agencies interested in improving assessment administration; and (8) to promote justice and equity in the distribution of the property tax burden.

The Association is not a "trade union" for assessors, but rather, is a nonprofit educational institution interested in promoting proper and equitable property taxation. Consequently, IAAO is concerned about assessment inequities that will result if the Court adopts the Respondent's theory that imported raw materials in their original packages and held for use in manufacturing within the state cannot be subjected to non-discriminatory ad valorem property taxation, along with other raw materials stored for use in manufacturing. IAAO is concerned about the inequities that will result if the Court affirms the decision of the Supreme Court of Ohio, which misinterprets the doctrine of collateral estoppel and the ruling of the Supreme Court of the United States in *Commissioner v. Sunnen*, 333 U.S. 591 (1948), so as to make one manufacturer perpetually immune from ad valorem property taxation on its imported raw materials while all other businesses' imported goods, including raw materials, are subject to nondiscriminatory ad valorem property taxation

because of a change in the controlling legal principles applicable to imports, announced by the Supreme Court of the United States in *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976). IAAO is concerned about the mountain of costly litigation that will result if the "original package" doctrine, rightly considered by most state and local government officials as buried by the Supreme Court of the United States in the *Michelin* case, is resurrected through a decision favoring the Respondent in the case at bar. Finally, IAAO is concerned about the loss of badly needed revenue which state and local governments may suffer if the Respondent prevails in this case. IAAO believes that neither the collateral estoppel doctrine, nor the U.S. Constitution prohibits Ohio's levying of non-discriminatory ad valorem personal property taxes on the Respondent's imported raw materials, and that the Court should rule accordingly.

SUMMARY OF ARGUMENT

We submit that the Supreme Court of Ohio erred in concluding that the Petitioner's levying of taxes upon the Respondent's imported raw material inventory was collaterally estopped by a decision of the Supreme Court of the United States in *Hooven & Allison Co. v. Evatt*, 324 U.S. 652 (1945) (*Hooven I*) Under the principles enunciated by the Court in *Commissioner v. Sunnen*, 333 U.S. 591 (1948), application of the collateral estoppel doctrine in the case at bar was precluded by the Court's decision in *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976), which so altered the legal atmosphere relative to the

constitutionality of personal property taxation of imports as to eviscerate the Respondent's collateral estoppel claims. The application of the *Sunnen* ruling in this case is not foreclosed simply because the *Michelin* Court did not specifically overrule *Hooven I*, and the application of the *Sunnen* ruling in the case at bar is, in fact, required in order to avoid inequalities in the administration of the revenue laws, discriminatory distinctions in tax liability, and litigious confusion. Accordingly, the Court should hold that the Petitioner's levying of an ad valorem tax upon the subject imported raw materials belonging to the Respondent is not barred by the doctrine of collateral estoppel.

The amicus IAAO also submits that the Court should decide the constitutional issues raised by the parties in favor of the Petitioner. The *Michelin* Court held that imposition of a non-discriminatory ad valorem personal property tax on imported goods held for sale is not within the constitutional prohibition against laying "any Imposts or Duties on Imports." The same analysis that led the *Michelin* Court to its decision also leads to the conclusion that imported raw materials may be subjected to non-discriminatory taxation of the sort imposed by Ohio in the case at bar, and such a determination is required in order that assessment inequities may be avoided and much needed revenue will not be denied to hard-pressed state and local governments. Therefore, the Court should hold that the Petitioner's levying of an ad valorem personal property tax upon the subject imported raw materials belonging to the Respondent is not prohibited by the Import-Export Clause of the Constitution.

ARGUMENT

1.

THIS COURT SHOULD HOLD THAT THE PETITIONER'S LEVYING OF AN AD VALOREM PERSONAL PROPERTY TAX UPON THE SUBJECT IMPORTED RAW MATERIALS BELONGING TO THE RESPONDENT IS NOT BARRED BY THE DOCTRINE OF COLLATERAL ESTOPPEL.

In this proceeding involving the Respondent's application for a review and redetermination of the Petitioner's decision that the value of the Respondent's imported raw material inventory is subject to non-discriminatory ad valorem personal property taxes, the Supreme Court of Ohio found that the Petitioner's levying of taxes upon the subject property was collaterally estopped by a decision of the Supreme Court of the United States in *Hooven & Allison Co. v. Evatt*, 324 U.S. 652 (1945) (hereafter referred to as *Hooven I*). In that case, the Court, relying upon the "original package" doctrine, held that the Respondent could not be taxed based upon the value of imported raw materials stored in their original packages in the Respondent's warehouses. *Hooven I*, 324 U.S. 652, 668.

Where the Supreme Court of Ohio erred was in rejecting the Petitioner's argument that the decision of this Court in *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976), so altered the "legal atmosphere" relative to the constitutionality of personal property taxation of imports as to eviscerate the Respondent's collateral estoppel claims. A careful reading of the *Michelin* decision and the decision of this Court in *Commissioner v. Sunnen*, 333 U.S. 591 (1948), provides ample evidence that collateral estoppel should not have been applied in the case at bar.

In the *Sunnen* case, the Supreme Court limited application of the collateral estoppel doctrine, holding that the doctrine is inapplicable where decisions of the Supreme Court intervening between the earlier and later litigation have changed the pertinent legal principles upon which the earlier court decision was based. *Commissioner v. Sunnen*, 333 U.S. 591, 599-601. Thus, the decision of the Court in *Sunnen* precludes application of collateral estoppel in the case at bar, since the Court in *Michelin*, intervening between *Hooven I* and the current litigation, abandoned the original package doctrine upon which *Hooven I* was based, at least with respect to its application in cases involving non-discriminatory property taxes (*Michelin Tire Corp. v. Wages*, 423 U.S. 276, 296-97), and specifically overruled *Low v. Austin*, 80 U.S. (13 Wall.) 29 (1872), the case from which the original package doctrine sprung (*Michelin Tire Corp. v. Wages*, 423 U.S. 276, 301). A better example of a case changing the legal principles upon which an earlier decision was based would be difficult to imagine, although it must be admitted that only the theory supporting the *Hooven I* decision was a casualty of the *Michelin* case. *Hooven I* itself was not specifically overruled in *Michelin*, probably because the two cases involved somewhat different fact situations and the overruling of *Hooven I* was not immediately required.

The Supreme Court of Ohio, in its decision below, seems to indicate that the *Sunnen* case does not control resolution of the collateral estoppel question in the case at bar because the *Michelin* Court did not specifically overrule *Hooven I*. But it is in just such cases as the instant one, where the earlier court decision involving the same parties has *not* been specifically overruled by the intervening decision of the Supreme Court, that the *Sunnen* decision was meant to be controlling. In *Sunnen* itself, no intervening reversal of the earlier decision, but a "change

in the legal picture," involving a "clarification and growth" of principles, and arising from several intervening U.S. Supreme Court decisions, made the doctrine of collateral estoppel inapplicable. *Commissioner v. Sunnen*, 333 U.S. 591, 602-606. *No intervening reversal of the earlier decision was even mentioned in the Sunnen Court's opinion*, which is significant considering that any such intervening reversal would certainly have controlled the *Sunnen* case. Had there been a specific reversal of the earlier decision when the Court decided the intervening cases, the Court would have had a much easier time disposing of the *Sunnen* case, and would not have been required to articulate at length the "changing legal principles" limitation upon collateral estoppel.

It should also be noted that the reasoning of the court below would require the Supreme Court of the United States, whenever it overruled a leading case like *Low v. Austin*, to specifically overrule each and every other case decision relying upon the leading case, in order to prevent application of collateral estoppel in later cases involving the same parties and issues. This heavy burden the *Sunnen* Court possibly sought to avoid by its development of the "changing legal principles" limitation.

In developing its own very important limitation upon the collateral estoppel doctrine, the *Sunnen* Court was aware that many inequalities and much unnecessary expense could result from improper application of collateral estoppel. The Court warned of certain harmful consequences of collateral estoppel much like those the Petitioner and the amicus IAAO are trying to avoid in the instant case, writing as follows, 333 U.S. at 599:

> "A taxpayer may secure a judicial determination of a particular tax matter, a matter which may recur without substantial variation for some years thereafter. But a subsequent modification of the signifi-

> cant facts or a change or development in the controlling legal principles may make that determination obsolete or erroneous, at least for future purposes. If such a determination is then perpetuated each succeeding year as to the taxpayer involved in the original litigation, he is accorded a tax treatment different from that given to other taxpayers of the same class. As a result, there are inequalities in the administration of the revenue laws, discriminatory distinctions in tax liability, and a fertile basis for litigious confusion (citations omitted). Such consequences, however, are neither necessitated nor justified by the principle of collateral estoppel. That principle is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally. It is not meant to create vested rights in decisions that have become obsolete or erroneous with time, thereby causing inequities among taxpayers."

Keeping in mind that "collateral estoppel must be used with its limitations carefully in mind so as to avoid injustice," 333 U.S. at 599, the *Sunnen* Court reviewed the limitations that had been placed upon collateral estoppel in prior judicial decisions. Citing *Tait v. Western Md. R. Co.*, 289 U.S. 620 (1933), the Court noted that the use of the collateral estoppel doctrine must be confined to situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged. 333 U.S. at 599-600. The *Sunnen* Court also noted that in *Blair v. Commissioner*, 30 U.S. 5 (1937), it was held that an intervening state court decision could "so change the legal atmosphere as to render the rule of collateral estoppel inapplicable." 333 U.S. at 600. Then, the *Sunnen* Court expanded upon the *Blair* ruling by declaring that "the intervening decision

need not necessarily be that of a state court, as it was in the *Blair* case. While such a state court decision may be considered as having changed the facts for federal tax litigation purposes, a modification or growth in legal principles as enunciated in intervening decisions of this Court may also effect a significant change in the situation. Tax inequality can result as readily from neglecting legal modulations by this Court as from disregarding factual changes wrought by state courts. In either event, the supervening decision cannot justly be ignored by blind reliance upon the rule of collateral estoppel." 333 U.S. at 600.[1]

The *Sunnen* Court did not ignore the "supervening" decisions facing it, and neither should the Court in the case at bar. Matters involving taxation of imported inventories have not remained "substantially static" since *Hooven I*, and the Court must hold that the *Sunnen* decision precludes application of collateral estoppel in the case

[1] Authorities supporting other limitations upon the doctrine of collateral estoppel, some of which seem to be applicable to the case at bar, are noted in 150 A.L.R. 38, s. 162 A.L.R. 1211, 92 L.2d 940. Among these are cases supporting the notion that collateral estoppel can only be applied properly when the facts that are the basis of the issue in the subsequent proceeding are not only substantially identical, but also, in period of time, are the very same facts that, as the subject of the former litigation, were before the court rendering the former judgment. 150 A.L.R. 38, 43-45. In addition, there are cases supporting the principle that collateral estoppel cannot be properly applied to questions of law, as opposed to questions of fact. 150 A.L.R. 38, 47. In the case a bar, the facts are not the very same facts that faced the Court in *Hooven I*, in that different shipments of substantially identical raw materials are involved; and the question to which collateral estoppel was applied by the Supreme Court of Ohio—whether nondiscriminatory ad valorem taxes on imported raw materials stored in their original packages for future manufacturing use are constitutional—is a question of law, not fact.

at bar to prevent the very same kinds of inequalities in tax administration and litigious confusion that the *Sunnen* Court feared. Therefore, the amicus IAAO respectfully submits that the Court should hold that the Petitioner's levying of an ad valorem personal property tax upon the subject imported raw materials belonging to the Respondent is not barred by the doctrine of collateral estoppel.

2.

THIS COURT SHOULD HOLD THAT THE PETITIONER'S LEVYING OF AN AD VALOREM PERSONAL PROPERTY TAX UPON THE SUBJECT IMPORTED RAW MATERIALS BELONGING TO THE RESPONDENT IS NOT PROHIBITED BY THE IMPORT-EXPORT CLAUSE OF THE UNITED STATES CONSTITUTION.

Although the Supreme Court of Ohio declined to address constitutional issues raised by the Respondent in its application for review and redetermination because the Ohio court held that the Petitioner was collaterally estopped from collecting the disputed taxes, the Petitioner has raised the question of whether the levying of an ad valorem personal property tax upon the subject raw materials belonging to the Respondent was prohibited by the Import-Export Clause of the United States Constitution (art. 1, §10, cl. 2). The amicus IAAO believes that a non-discriminatory ad valorem tax like Ohio's, applied to imported raw materials stored in their original packages for future use in manufacturing, is not prohibited by the Import-Export Clause, and that this Court should so hold.

As noted above, the *Michelin* Court largely repudiated the original package doctrine, which the Respondent would use to shield its raw materials from taxation.

Michelin Tire Corp. v. Wages, 423 U.S. 276, 296-97. In fact, the *Michelin* Court held that Georgia's imposition of a non-discriminatory ad valorem personal property tax on an inventory of tires in storage was not within the constitutional prohibition against laying "any Imposts or Duties on Imports," *without addressing the question of whether the Georgia Supreme Court was correct in holding that the tires had lost their status as imports.* 423 U.S. 276, 279. The Court was able to reach this conclusion because its own independent study persuaded the Court that a non-discriminatory ad valorem property tax is not the type of state exaction which the framers of the U.S. Constitution had in mind as being an "impost" or "duty." 423 U.S. 276, 283.

The case at bar, like *Hooven I*, does not deal with taxes on "goods" for sale, like tires, but with taxes on raw materials to be used in manufacturing. This fact may explain why the *Michelin* Court did not specifically overrule *Hooven I* when it overruled *Low v. Austin*, 80 U.S. (13 Wall.) 29 (1872), another decision involving "goods" (wine). Perhaps, the *Michelin* Court wanted to reserve judgment on the question of whether ad valorem taxes on raw materials should be treated in the same way as the taxes on the "goods" in *Michelin* for purposes of Import-Export Clause analysis.

In any event, the same analysis that led the *Michelin* Court to conclude that non-discriminatory ad valorem property taxes on "goods" are not "imposts" or "duties" also leads to the conclusion that imported raw materials may be subjected to non-discriminatory taxation. Nothing in the Constitution itself, or in the authorities cited in the *Michelin* decision, supports a distinction between "goods" and raw materials for purposes of determining the constitutionality of ad valorem property taxes under

the Import-Export Clause of the Constitution. If the Import-Export Clause "cannot be read to accord imported goods preferential treatment that permits escape from uniform taxes imposed without regard to foreign origin for services which the State supplies," 423 U.S. at 287, the Import-Export Clause likewise accords no preferential treatment to imported raw materials.

It is preferential treatment, however, that the Respondent is seeking in the case at bar. Should the Court rule for the Respondent, holding that the Petitioner's nondiscriminatory ad valorem property tax cannot constitutionally be levied on the Respondent's inventory of raw materials, the Court would be approving an exemption from property taxation that would ultimately discriminate against other raw materials produced in the United States, other imported raw materials no longer in their original packages, other imported raw materials not packaged at all, and inventories other than raw materials, creating assessment inequities at the state and local level, producing mountains of litigation, and at the same time denying much needed revenue to hard-pressed state and local governments.

Added to the enormous amount of property that is already exempt from state and local taxation, the property which the Respondent proposes to exempt, belonging to itself and to other manufacturers, would constitute a burden to state and local governments, and the exemption would likely contribute to the constant raising of taxes on nonexempt property, and the reduction of state and local government services, which have accompanied the sizeable increases we have seen lately in the types of property and the types of property owners that are eligible for ad valorem tax exemptions.

When one property is exempted from taxation, owners of other property tend to bear a greater tax burden as a result. Thus, not only will owners of other inventories not exempted from taxation be at a disadvantage as a result of a ruling for the Respondent in the case at bar, but also, owners of nonexempt property in general will be at a disadvantage. Further promoting of this kind of assessment inequity, which allows some property owners to pay no tax at all, while their neighbors are forced to settle for a reduction in state and local government services, or bear more than their fair share of the ever-increasing cost of government services, should be done only with the very greatest care, and there is no reason for such action in the case at bar.

CONCLUSION

We respectfully conclude that this Court should hold that the Petitioner's levying of an ad valorem personal property tax upon the subject imported raw materials belonging to the Respondent is not barred by the doctrine of collateral estoppel or prohibited by the Import-Export Clause of the United States Constitution (art. 1, §10, cl. 2).

Respectfully submitted,

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No. 83-96-CSX
Status: GRANTED

Title: Joanne Limbach, Tax Commissioner of Ohio, Petitioner
v.
The Hooven & Allison Company

Docketed:
July 15, 1983

Court: Supreme Court of Ohio

Counsel for petitioner: Farrin, Richard C.

Counsel for respondent: Nims, Michael A.

Entry	Date	Note	Proceedings and Orders
1	Jul 15 1983	G	Petition for writ of certiorari filed.
2	Aug 15 1983		Brief of respondent in opposition filed.
3	Aug 17 1983		DISTRIBUTED. September 26, 1983
4	Oct 3 1983		Petition GRANTED.
			**********
5	Nov 9 1983	G	Motion of International Association of Assessing Officers for leave to file a brief as amicus curiae filed.
6	Nov 14 1983		Record filed.
7	Nov 14 1983		Certified transcript of record received.
8	Nov 17 1983		Brief of petitioner Limbach, Tax Commr. of OH filed.
9	Nov 17 1983		Joint appendix filed.
10	Nov 28 1983		Motion of International Association of Assessing Officers for leave to file a brief as amicus curiae GRANTED.
11	Dec 17 1983		Brief of respondent Hooven & Allison Co. filed.
12	Jan 9 1984		SET FOR ARGUMENT. Wednesday, February 22, 1984. (3rd case)
13	Jan 11 1984		CIRCULATED.
14	Feb 15 1984	X	Reply brief of petitioner Limbach, Tax Commr. of OH filed.
15	Feb 22 1984		ARGUED.